TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1578. 1126

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, APPELLANT,

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

No. 1579. 1127

THE WESTERN UNION TELEGRAPH COMPANY, APPELLANT,

vs.

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

No. 1580. 1128

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, APPELLANT,

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

No. 1581. 1129

THE WESTERN UNION TELEGRAPH COMPANY, APPELLANT,

vs.

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

No. 1582. 1130

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, APPELLANT,

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

No. 1583. 1131

THE WESTERN UNION TELEGRAPH COMPANY, APPELLANT,

vs.

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED MARCH 3, 1890.

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THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, APPELLANT,

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No. 1579.

THE WESTERN UNION TELEGRAPH COMPANY, APPELLANT,

vs.

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

No. 1580.

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, APPELLANT,

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

No. 1581.

THE WESTERN UNION TELEGRAPH COMPANY, APPELLANT,

vs.

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

No. 1582.

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, APPELLANT,

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

No. 1583.

THE WESTERN UNION TELEGRAPH COMPANY, APPELLANT,

vs.

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

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1 UNITED STATES OF AMERICA, *Massachusetts District*, } *ss:*

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Tuesday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-nine, before the Honorable Le Baron B. Colt, circuit judge.

ATTORNEY GENERAL OF COMMONWEALTH OF MASSACHUSETTS, by Information, *v.* WESTERN UNION TELEGRAPH COMPANY. } No. 2553, Equity Docket.

This cause was begun in the supreme judicial court of the Commonwealth of Massachusetts for the county of Suffolk, and was removed to this circuit court upon the petition of the defendant and here entered at the May term, A. D. 1888.

Upon entry of said cause in this circuit court on the fifteenth day of May, A. D. 1888, certified copies of the following papers on file in said supreme judicial court were filed, namely: 1, information; 2, subpœna; 3, appearance for defendant; 4, petition for removal; 5, bond for removal; 6, order for removal.

2 1. *Information.* (*Filed in State Court Dec.* 20, 1887.)

(Tax of 1886.)

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

To the honorable the justices of the supreme judicial court, sitting in equity:

Informing, showeth unto your honors Andrew J. Waterman, attorney general of the Commonwealth of Massachusetts, at the relation of Elanson W. Beard, treasurer of said Commonwealth, for and on behalf of said Commonwealth, that the Western Union Telegraph Company is and from a time anterior to the first day of May, 1886, has been a corporation which owns, controls, and uses, under lease or otherwise, lines of telegraph within said Commonwealth for the purposes of business or profit, and having a capital stock divided into shares, and a corporation embraced within the provisions of section forty of chapter thirteen of the Public Statutes; that on the twenty-second day of September, 1886, in accordance with the provisions of said chapter, the tax commissioner of said Commonwealth, acting under the provisions of said chapter, duly ascertained and estimated the fair cash valuation of all the shares constituting the capital stock of said corporation on the first day of May aforesaid; that said valuation thus ascertained and determined was, on said first day of May, $50,600,000; that said commissioner also as-

certained and determined that the credits to said corporation were, on said first day of May, of the value of $8,206,593; that the total number of miles of line of said corporation was 151,152.30, 148,321.23 of which were beyond the limits of said Commonwealth, leaving 2,811.07 miles within the limits of said Common-
3 wealth; that, in accordance with the provisions of the fortieth section of said thirteenth chapter, $12,393,407 of the total valuation of said stock divided by 151,152.30, the total number of miles of line, and multiplied by 2,811.07, the number of miles of line within the Commonwealth, gives $788,416, the taxable value of the shares of said corporation within said Commonwealth; that the rate of taxation for said year 1886, duly determined in accordance with the provisions of the fortieth section of said thirteenth chapter of the Public Statutes, was $14.48 for and upon each one thousand dollars of valuation; that the tax commissioner of the Commonwealth, on the fourth day of October, 1886, notified, in accordance with the provisions of the fifty-third section of said chapter, the treasurer of said corporation that a tax would be due and payable to the treasurer of the Commonwealth by said corporation in thirty days from the date of said notice, provided said tax should not be due and payable before the first day of November, 1886; that the amount of said tax was $11,416.28; and also notified the treasurer of said corporation that within ten days from the date of said notice said corporation might apply for a correction of said tax and be heard thereon before the board of appeal provided in said chapter.

And said attorney general, at the relation aforesaid, says that by virtue of said statute and said proceedings said corporation became liable and was bound to pay to the treasurer of the said Commonwealth said tax in thirty days from the date of said notice: Provided, however, that said tax should not be payable before the first day of November, 1886, but that said corporation has not paid said taxes to said treasurer of the Commonwealth or any portion thereof, and has neglected and failed to pay the same and still owes the same to said Commonwealth and interest thereon at the rate of twelve per cent. per annum.

Wherefore, pursuant to said statute, your informant prayeth your honors to order and decree that said sum due for taxes as aforesaid shall be paid to said Commonwealth by the said corporation,
4 with interest thereon at the rate of twelve per cent. per annum, together with the costs of this information, and to grant unto your informant a writ of injunction issuing out of and under the seal of this honorable court, to be directed to the said corporation and its officers, agents, and servants, commanding them and each of them absolutely to desist and refrain from the further prosecution of the business of said corporation until said sums due to the said Commonwealth as aforesaid shall have been fully paid with interest and costs; and your informant prayeth your honors to grant unto said Commonwealth such other and further relief in the premises as the nature of the circumstances of this case may require and to your honors shall seem meet.

And to the end that the said Western Union Telegraph Company may full and true answer make to all and singular the matters as aforesaid, may it please your honors to grant unto your informant a writ of subpœna, to be directed to the said corporation, thereby commanding it, at a certain time and under a certain penalty therein to be limited, to appear before this honorable court and then and there full, true, direct, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to your honors shall seem meet.

ANDREW J. WATERMAN,
Attorney General.

Filed Dec. 20, 1887.
Att.: JOHN NOBLE, *Clerk.*

2. Subpœna.
3. Appearance for defendant.
4. Petition for removal.
5. Bond for removal.

(MEMORANDUM.—By direction of counsel for both parties the above papers, 2 to 5, inclusive, are omitted in this record.—John G. Stetson, clerk).

5 6. *Order for Removal.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Supreme Judicial District. In Equity.

ATTORNEY GENERAL *ex Rel.* TREASURER OF COMMONWEALTH
v.
WESTERN UNION TELEGRAPH COMPANY.

And now, in the above-entitled cause, it appearing to the court that the defendant has duly filed in this court its petition praying for the removal of said cause to the circuit court of the United States of America for the district of Massachusetts, and also a satisfactory bond, pursuant to the statute of the United States, which has been approved by this court—

It is ordered that this cause be removed to the said circuit court in accordance with the prayer of the petition.

By the court: JOHN NOBLE, *Clerk.*
January 31, 1888.

This cause was thence continued to the October term of this court, A. D. 1888. On the twenty-fifth day of October, A. D. 1888, the following answer was filed in this circuit court:

6 *Answer of Western Union Telegraph Company.* (*Filed Oct.* 25, 1888.)

Tax of 1886.

This respondent, now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in said information contained, for answer thereto, or to so much thereof as this respondent is advised is material or necessary for it to make answer to, answering, saith that this respondent is and before and on and since the twenty-fourth day of July, in the year 1866, was and has been a corporation chartered and organized in the State of New York under the laws of said State, having a capital stock divided into shares, which owns, controls, or uses lines of telegraph in various parts of the United States, of the Dominion of Canada, and the Atlantic Ocean, and in the said State of Massachusetts, constructed and maintained, as hereinafter set forth, in said State, mostly over and along the post roads of the United States which have been declared to be such by law, and over, under, and across the navigable streams of waters of said United States; that on the 5th day of June, in the year 1867, said company duly accepted, and soon thereafter, to wit, on or about the 12th day of June, in said year, duly filed its written accept-
7 ance with the Postmaster General of the United States of the restrictions and obligations required by law under and in accordance with the act of the Congress of the United States of July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes."

That upon such filing it became entitled to and had and hath ever since had the right and franchise to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States, and by and under said act and acceptance and filing the said company became and hath ever since been bound and obliged to give priority over all other business to telegrams between the several Departments of the Government of the United States and their officers and agents, and to sell all its telegraph lines, property, and effects to said United States at an appraised value.

And the respondent further says that its lines extend to and from said State of Massachusetts into and through most of the States and Territories of the United States, Washington, in the District of Columbia; the Dominion of Canada, and the Atlantic Ocean, and connect with those owned and established by the Government of the United States for public purposes, and that said company is in close communication with other telegraph companies doing business in

this country and abroad—that is to say, in and out of the United States and beyond seas.

And this respondent further avers that, in the exercise of the powers and privileges conferred upon it as aforesaid, it did, on and before and since the first day of May, 1886, rightfully construct, operate, and maintain lines of telegraph in various parts of said
8 State, mostly upon, over, and along post roads of the United States, declared to be such by law, lying in said State of Massachusetts, and over, under, and across the navigable streams and waters of said United States lying and being in said State, and did and does transact its general business and was engaged in the occupation and business of transporting messages over said lines and using the same for foreign and interstate commerce and the postal service and the business of the United States on and over said lines maintained on said post roads in said State, and on and over other lines of telegraph therewith connected owned and controlled or used and maintained by it in and through other parts and States of said United States, said Dominion, and said ocean. The said company thereby became and was and is an instrument of foreign and interstate commerce and a Federal agent for the transmission of commercial and other messages in general and of the business of the United States between points within said State of Massachusetts and points within other States of the United States and over and through said State from and to and into other States of the United States, as well as from point to point within said State, and make and makes use of said lines on said post roads and uses the franchises and privileges granted and secured to it by said act of July 24, 1866, on and over said post roads for foreign and interstate commerce and in the postal service of the United States and in and for the service and business of the United States, which it is bound by law to render and perform and does continually and constantly render to said United States as aforesaid.

And this respondent further says that the actual cash value to this respondent of the said rights and franchises acquired, possessed, and used by it under said act of Congress, as a whole or of such part thereof as is exercised within the State of Massachusetts, cannot be determined, but this respondent avers that the same are of great value to it in the conduct of its general business of transmitting messages by telegraph and do materially affect and largely increase the
9 actual and the market value of the shares of its capital stock; and it further avers that the total fair cash value of all its property, real and personal, owned and used by it in said State of Massachusetts, not including its said franchises, did not exceed, on said first day of May, 1886, the sum of $422,756.75, and that not exceeding — shares of its capital stock on said first day of May were owned by persons then resident in said State of Massachusetts.

And this respondent further avers that the general court or Legislature of said State, with the approval of the Governor thereof, did, before said first day of May, 1886, enact in substance (but as more fully set forth in sections 38, 39, 40, 41, and 42 of chapter 13

of its Public Statutes, whereto this respondent prays that reference may be had as if fully and at length set forth herein) that this respondent, as well as other like companies, should annually return to the tax commissioner of said State the amount of its capital stock, the number of shares thereof, and the par and market value of said shares on the first day of May, with a statement of the works, structures, real estate, and machinery owned by it and subject to local taxation within said State; also the whole length of its lines and the length of so much thereof as is or should be without said State; that said tax commissioner should ascertain, from said return or otherwise, the fair market value of said shares, and estimate therefrom the fair cash valuation of all of said shares constituting its capital stock on said first day of May, which should be taken as the true value (not of its property, but) of the corporate franchise of said company for the purposes of the tax hereinafter mentioned, and that this respondent should annually pay a tax to said State upon said corporate franchise (not upon its stock or property) at said valuation of said franchise equal to the aggregate value of the shares of its capital stock, ascertained as aforesaid as provided by said section 39, after deducting such portion of said valuation as should be proportional to the length of that part of its line lying without said State, and also deducting the value of that part only of its real estate and machinery located and subject to local taxation within said State.

10 And this respondent further says that, in submission to the demands and enactments of said State of Massachusetts, it did make such return in the words and figures set forth in the paper hereto annexed, marked "A," setting forth the facts therein stated, which this respondent avers to be true as so set forth, accompanied by a communication in its behalf, to the Hon. Alanson W. Beard, treasurer and tax commissioner of said State, of which the paper hereto attached, marked "B," is a copy.

And this respondent, further answering, avers that the whole length of the said lines in said month of May, within and without said State, did not exceed one hundred and fifty-one thousand one hundred and fifty-two and $\frac{30}{100}$ (151,152.30) miles, and the whole length of its lines within said States not on, over, or along post roads of the United States declared to be such by law, or over, under, or across the navigable streams or waters of the United States, did not exceed four hundred and ninety-four $\frac{63}{100}$ (494.63) miles, and that all the remainder of its lines within said State (to wit, 2,316.44 miles) was on, over, or along such post roads, or over, under, or across such streams or waters, or that this respondent then owned real estate without said State, located and subject to local taxation in other States and Territories of said United States or in said District, to the amount and value of $3,044,282.34, whereon local taxes were assessed and paid by the respondent in and for said year 1886, besides and in addition to taxes in said year assessed in different jurisdictions upon shares of its capital stock as the property of individuals.

And this respondent, further answering, says that said tax commissioner, acting for and in behalf of said State, did under said

statute thereupon proceed to assess a State tax upon this respondent, substantially in the manner set forth in the complainant's bill, by valuing its capital stock, being 80,000 shares of the par value of $100 per share, from its market value, at $63.25 per share, or in all $50,600,000, and deducting only for its unissued shares
11 $13,109.37. For stocks in other companies outside of its system not included in said miles of line, 8,193,482.72=8,206,593 (and nothing for said real estate), leaving $42,393,407, and valuing the proportion thereof taxable in said State on said mileage basis at $\frac{28}{1511}\frac{11}{852}\frac{07}{30}$ths of said $42,393,407, or $788,416, upon which $788,416 a State tax of $14.48 per $1,000, being $11,416.26, was assessed to this respondent.

And this respondent avers that said statute declares that such valuation shall be taken as the true value of the corporate franchise of said company for the purpose of State taxation of said franchise, and does not provide or declare that said valuation is or shall be taken as the true value of the property owned and used by it in said State, or purport or attempt to impose or assess said tax as a tax upon said property, and further avers that the supreme judicial court of said State and the Supreme Court of the United States have determined that said tax cannot be held valid unless it can be construed to be in the nature of an excise on the franchise of said company and not a tax on the property belonging to them, and that, regarded as a tax on property, the tax is plainly invalid and cannot be supported for a moment, as the law, if construed as authorizing such a tax, is in direct contravention of the constitution of said State.

And this respondent avers that said tax is wholly invalid and cannot be in any part sustained or collected as a tax on property owned and used by it in said State, if any, liable by suitable legislation and proceeding to be legally assessed, and that even if said tax was intended to be in effect a tax on this respondent on account of said property and could be sustained as such in the absence of evidence that it included other property not taxable, then this respondent avers that the mode of valuation and assessment prescribed by said statute described includes the full values of all the franchises and powers vested in, acquired, possessed, used, and exercised by said company by or under said act of Congress of July
12 24, 1876, or otherwise, as well as the full value of all such property; that all said values are in said valuation and assessment undistinguishably and inseparably blended with each other so as to make a valuation largely in excess of the fair value of said property or of any property legally subject to taxation in said State, and are, as well — such tax therefor, unconstitutional and void.

Yet this respondent, although denying as aforesaid that the property owned or used by it in said State has been lawfully or constitutionally assessed, denying that anything is due from it on account of said tax as alleged in said bill, and not waiving any rights, does nevertheless say it believes it ought to bear a just share and proportion of the public burdens in said State by an assessment

under proper legislation and in a proper form at fair values on its real and personal property therein situated and used.

That it is ready and willing to pay to said State a tax at the rate per $1,000 (to wit, $14.48) fixed by said State upon the fair value of all its real and personal property situated, owned, and used by it in said State, to wit, on said $422,756.75 as aforesaid, not claiming that its actual, tangible property is, as such, exempt from taxation because it is placed on post roads or navigable waters or is used for interstate commerce; and it prays leave of this court to bring and pay and by said leave doth bring and pay into said court for the use of the complainant, to be by it taken without condition or future objection, the sum of $7,574.47, being, as aforesaid, $14.48 per $1,000 of said $422,756.75 (as the full and true value of all said property), with interest, at the rate of 12 per cent. per annum, thereon from the third day of November, A. D. 1886, to the time of said payment, together with $40.60, costs of this suit to said time, and the clerk's fees for such payment.

This respondent, further answering, admits that the tax commissioner of the Commonwealth, by a notice dated on the fourth day of October, 1886, notified, in accordance with the provisions of the fifty-third section of said chapter, the treasurer of said corporation that a tax would be due and payable to the treasurer
13 of the Commonwealth by said corporation in thirty days from the date of said notice; that the amount of said tax was $11,416.26, and also notified the treasurer of said corporation that within ten days from the date of said notice said corporation might apply for a correction of said tax and be heard thereon before the board of appeal provided in said chapter.

But, for the reasons aforesaid, this respondent submits and avers that said franchise tax of $11,416.26 assessed to and upon it is disproportional, illegal, unconstitutional, and void, and denies that it owes the same to said State or owes to it any interest thereon, and avers that this respondent ought not to be required to pay the same or to desist and refrain from the further prosecution of its business and the use and enjoyment of its said rights, privileges, and franchises, as prayed by said information.

THE WESTERN UNION TELEGRAPH COMPANY,
By NORVIN GREEN, *President.*

Filed Oct. 25, 1888.

"A."

Subject: —.

Hale & Walcott, attorneys and counsellors at law, Hemenway building, 10 Tremont street, Boston, rooms 65, 66, and 67.

Geo. S. Hale. Chas. F. Walcott.

JUNE 21, 1886.

To the Hon. A. W. Beard, treasurer and tax commissioner of the Commonwealth of Massachusetts.

DEAR SIR: In behalf of the Western Union Telegraph Company I beg leave to submit herewith its return required by the 38th section of the Public Statutes, and to refer you to a letter addressed to your predecessor in office in regard to the like return and the tax on said company in the year 1885, dated June 27, 1885.

Said company respectfully submits and protests that the tax assessed upon said company in said year in said Commonwealth or any tax assessed on the basis, nett valuation, and principle on which that tax was assessed was not and could not be proportional or reasonable nor in conformity with, but was and would be in violation of and not allowed by, the Constitution and laws of the United States or of said Commonwealth, and was and would be illegal and void for many reasons, and among these reasons because, while in case of other corporations included in section 38 of said chapter a deduction is allowed as therein provided on account of the real estate and machinery subject to local taxation wherever situated, no such deduction was allowed in fixing said tax in the year 1885 of the value or on account of any real estate or machinery of said company situated out of said Commonwealth, although it owned, was assessed, and paid taxes on a large amount of such real estate in and for said year, to wit, on $3,058,993.82, and because there was included as in the length of its lines within said Commonwealth in the estimate of valuation made under said section 40 of said chapter, for the purpose of fixing said tax, lines of said company to a large amount built by authority and permission of the United States on post roads of the United States, as set forth in said letter, and said company does not admit but denies that such tax was or would be in any part or to any extent legal or valid, but it is willing and desirous and offers, without prejudice to any right or claim of either party in any controversy, litigation, or proceedings in regard to said or any such tax, to pay into the treasury of said Commonwealth such amount as would be assessed on a basis of deducting from the valuation ascertained as first provided by section 40 of said
15 chapter an amount equal to the value of its real estate subject to local taxation, wherever situated, which was, it avers, in 1885 $3,058,993.82 and in 1886 $3,044,282.34, and not including for the purpose of such taxation any part of the length of its said lines in said Commonwealth on said post roads. A tax so ascertained, it now supposes, would be in 1885 $1,720.77, which, as afore-

said, it now encloses without prejudice as aforesaid to and not — be used or relied on against the rights or claims of either party in any litigation or controversy; but, of course, if the company are held liable in the pending suit, to be applied *pro tanto* in discharge of any such liability.

Very respectfully yours, GEO. S. HALE.

"B."

Western Union Telegraph Company, treasurer's office.

NEW YORK, *June 15th*, 1886.

Hon. Alanson W. Beard, tax commissioner of the Commonwealth of Massachusetts.

SIR: I, Roswell H. Rochester, treasurer of the Western Union Telegraph Company, hereby return that on the first day of May, 1886, said corporation held its principal place of business at the city of New York.

Its capital stock was	$80,000,000 00
The whole number of its shares	800,000
The par value of each share was	$100 00
The market value of each share was	62 50
The value of real estate owned by the corporation without the State of Massachusetts was	3,044,282 34
The value of the real estate owned by the corporation within the State of Massachusetts was	None.
16 The total number of miles of line owned or leased was	151,152.30
Of which the number of miles (not on post roads of the United States and excluding 2,316.44 miles which were on post roads of the United States) within the State of Massachusetts was	494.63
Total property, 800,000 shares, at $62.50 per share	$50,000,000 00

This includes:

Real estate	3,044,282 34
209¾ shares held by this company unissued at 62½	13,109 37
Stocks in other companies outside of our system not included in above statement of miles of line	8,193,483 72
Balance value of 151,152.30 miles of line	38,749,124 57
Value, at same rate, of said 494.63 miles as the valuation of the corporate franchise of said company for taxation under the laws of Massachusetts	126,802 43

This return includes the lines and property of the American Union Telegraph Company, the Franklin Telegraph Company, the Mutual Union Telegraph Company, and the Gold and Stock Telegraph Company as part of the Western Union lines.

Respectfully yours, R. H. ROCHESTER, *Treasurer.*

17 On said twenty-fifth day of October, A. D. 1888, the defendant filed the following motion for leave to pay money into court:

Defendant's Motion for Leave to Pay Money into Court. (*Filed Oct.* 25, 1888.)

And now the defendant comes and moves the court that it may have leave, on such terms, if any, as this court shall fix, to bring the sum of $7,574.47, being 14.48 per $1,000 of the sum of $422,756.75 mentioned in the answer in said case, with interest, at the rate of 12 per cent. per annum, thereon from the 3d day of November, 1886, to this day, October 25, 1888, inclusive, and $40.60, costs of said plaintiff, and also the fees of the clerk on such payment or amount to the same effect as if allowed by the rule of this court in actions at law.

By its attorney, GEO. S. HALE.

The foregoing motion was allowed by the court on said twenty-fifth day of October, A. D. 1888, and the defendant thereupon paid into court $7,574.47, and $40.60, costs to date, taxed in favor of the plaintiff, and also the fees of the clerk on such payment.

On the twenty-seventh day of October, A. D. 1888, the following agreement was filed:

Agreement for Appointment of Master or Examiner. (*Filed Oct.* 27, 1888.)

In the above case it is consented that Francis S. Fiske, Esq., be appointed master or examiner.

H. C. BLISS,
Assistant Attorney General.
GEORGE S. HALE,
For Defendant.

18 On the twenty-ninth day of October, A. D. 1888, the foregoing agreement of the parties was allowed by the court, and Francis S. Fiske, Esq., was appointed special examiner.

On the thirteenth day of November, A. D. 1888, the following replication was filed:

Replication. (*Filed Nov.* 13, 1888.)

And now comes the plaintiff and joins issue on the defendant's answer.

H. C. BLISS,
Assistant Attorney General.

This cause was thence continued from term to term to the present October term of this court, A. D. 1889, when, on the twenty-seventh day of December, the report of the examiner is filed, and this cause is set down for hearing and fully heard by the court upon the pleadings and the report of the examiner herein. On the twenty-ninth

day of January, A. D. 1890, the court announced that, upon the authority of the case of The Western Union Telegraph Company *v.* The Attorney General of the Commonwealth of Massachusetts, 125 U. S., 530, the plaintiff herein is entitled to a decree, and the terms thereof being settled the following final decree is entered on the twenty-first day of February, A. D. 1890.

Final Decree. Feb. 21, 1890.

COLT, *J.:*

This case came on to be heard at this term of the court and was argued by counsel, and thereupon, in consideration thereof, it is now, to wit, the twenty-first day of February, A. D. 1890, by this court found, ordered, adjudged, and decreed as follows:

19 That the facts set forth in and shown by the examiner's report filed in this cause are true; that the method of valuation, assessment, and taxation provided by the laws of Massachusetts upon the franchise of the defendant corporation is not, as was claimed and contended by said defendant, illegal and unconstitutional under the constitution and laws either of the State of Massachusetts or the United States—that is to say, either under the Constitution of the United States, article one, section 8; article III, section 2; article VI, amendments V and XIV; under the Revised Statutes of the United States, sections 5263, 5264, 5265, 5266, 5267, 5268, 5269, including a revision and consolidation of the act of July 24, 1866, chapter 230, accepted by the defendant before the revision, or section 221, or under the constitution of said State, part I, art. X; part II, chapter 1, section IV, or chapter 13 of its Public Statutes—but was and is in conformity with and authorized by said constitutions and laws, and that there was therefore due the plaintiff on the fifth day of November, 1886, the sum of $11,416.26; that the plaintiff is entitled to recover said sum and interest thereon from said November fifth, 1886, to October 25, 1888, at the rate of twelve per cent. per annum, amounting to $14,118.11, with $40.60, costs then accrued; that the defendant is entitled to have deducted from said amount as of said last-mentioned date the sum of $7,574.47 and the said $40.60 costs, said sum and costs having been on that day paid into court by defendant on its motion for leave to pay money into court, leaving due on said 25th day of October, 1888, the sum of $6,543.64; that the plaintiff recover said sum of $6,543.64, with interest thereon from said last-mentioned date, at the rate of twelve per cent. per annum, to the date of entry of this decree, amounting to $7,584.08, beside $37.14 costs, accruing from October 25, 1888, and thereafter until payment interest on said amount of said judgment at the rate of six per cent. per annum.

By the court: JOHN G. STETSON, *Clerk.*

20 From this decree both parties in open court claim an appeal to the Supreme Court of the United States, and the defendant, waiving any security from the plaintiff, gives good and sufficient security to the plaintiff that it will prosecute its appeal to effect and

answer all damages and costs if it fail to make its appeal good, and the said appeals of the plaintiff and of the defendants are respectively allowed.

A true record.

Attest: JOHN G. STETSON, *Clerk.*

21 UNITED STATES OF AMERICA, *Massachusetts District,* } *ss:*

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Tuesday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-nine, before the Honorable Le Baron B. Colt, circuit judge.

ATTORNEY GENERAL OF COMMONWEALTH OF MASSACHUSETTS, by Information, *v.* WESTERN UNION TELEGRAPH COMPANY. } No. 2554, Equity Docket.

This cause was begun in the supreme judicial court of the Commonwealth of Massachusetts for the county of Suffolk, and was removed to this circuit court upon the petition of the defendant and here entered at the May term, A. D. 1888.

Upon entry of said cause in this circuit court on the fifteenth day of May, A. D. 1888, certified copies of the following papers on file in said supreme judicial court were filed, namely: 1, information; 2, subpœna; 3, appearance for defendant; 4, petition for removal; 5, bond for removal; 6, order for removal.

22 1. *Information.* (*Filed in State Court Dec.* 20, 1887.)

(Tax of 1887.)

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

To the honorable the justices of the supreme judicial court, sitting in equity:

Informing, showeth unto your honors Andrew J. Waterman, attorney general of the Commonwealth of Massachusetts, at the relation of Alanson W. Beard, treasurer of said Commonwealth, for and on behalf of said Commonwealth, that the Western Union Telegraph Company is and from a time anterior to the first day of May, 1887, has been a corporation which owns, controls, and uses under lease or otherwise lines of telegraph within said Commonwealth for the purposes of business or profit, and having a capital stock divided into shares, and a corporation embraced within the provisions of section forty of chapter thirteen of the Public Statutes; that on the twenty-sixth day of September, 1887, in accordance with the provisions of said chapter, the tax commissioner of said Commonwealth, acting under the provisions of said chapter, duly ascer-

tained and estimated the fair cash valuation of all the shares constituting the capital stock of said corporation on the first day of May aforesaid; that said valuation thus ascertained and determined was on said first day of May $60,800,000; that said commissioner also ascertained and determined that the credits to said corporation were on said first day of May of the value of $8,208,584; that the total number of miles of line of said corporation was 152,243.80, 149,344.08 of which were beyond the limits of said Commonwealth, leaving 2,899.72 miles within the limits of said Commonwealth; that in accordance with the provisions of the fortieth section of said thirteenth chapter $52,391,416 of the total valuation of said stock divided by 152,243.80, the total number of miles of line, and multiplied by 2,899.72, the number of miles of line within the
23 Commonwealth, gives $1,001,685, the taxable value of the shares of said corporation within said Commonwealth; that the rate of taxation for said year 1887, duly determined in accordance with the provisions of the fortieth section of said thirteenth chapter of the Public Statutes, was $15.06 for and upon each one thousand dollars of valuation; that the tax commissioner of the Commonwealth on the fourth day of October, 1887, notified, in accordance with the provisions of the fifty-third section of said chapter, the treasurer of said corporation that a tax would be due and payable to the treasurer of the Commonwealth by said corporation in thirty days from the date of said notice, provided said tax should not be due and payable before the first day of November, 1887; that the amount of said tax was $15,085.38; and also notified the treasurer of said corporation that within ten days from the date of said notice said corporation might apply for a correction of said tax and be heard thereon before the board of appeal provided in said chapter.

And said attorney general at the relation aforesaid says that by virtue of said statute and said proceedings said corporation became liable and was bound to pay to the treasurer of the said Commonwealth said tax in thirty days from the date of said notice: Provided, however, that said tax should not be payable before the first day of November, 1887, but that said corporation has not paid said taxes to said treasurer of the Commonwealth or any portion thereof, and has neglected and failed to pay the same and still owes the same to said Commonwealth and interest thereon at the rate of twelve per cent. per annum.

Wherefore, pursuant to said statute, your informant prayeth your honors to order and decree that said sum due for taxes as aforesaid shall be paid to said Commonwealth by the said corporation, with interest thereon at the rate of twelve per cent. per annum, together with the costs of this information, and to grant unto your informant a writ of injunction, issuing out of and under the seal of this honorable court, to be directed to the said corporation and its officers,
agents, and servants, commanding them and each of them
24 absolutely to desist and refrain from the further prosecution of the business of said corporation until said sums due to the said Commonwealth as aforesaid shall have been fully paid,

with interest and costs; and your informant prayeth your honors to grant unto said Commonwealth such other and further relief in the premises as the nature of the circumstances of this case may require and to your honors shall seem meet.

And to the end that the said Western Union Telegraph Company may full and true answer make to all and singular the matters as aforesaid, may it please your honors to grant unto your informant a writ of subpœna, to be directed to the said corporation, thereby commanding it, at a certain time and under a certain penalty to be limited, to appear before this honorable court and then and there full, true, direct, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to your honors shall seem meet.

ANDREW J. WATERMAN,
Attorney General.

Filed Jan. 15, 1888.

Att.: JOHN NOBLE, *Clerk.*

2. Subpœna.
3. Appearance for defendant.
4. Petition for removal.
5. Bond for removal.

(MEMORANDUM.—By direction of counsel for both parties the above papers, 2 to 5, inclusive, are omitted in this record.—John G. Stetson, clerk.)

25 6. *Order for Removal.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Supreme Judicial Court. In Equity.

ATTORNEY GENERAL *ex Rel.* TREASURER OF COMMONWEALTH
v.
WESTERN UNION TELEGRAPH COMPANY.

And now, in the above-entitled cause, it appearing to the court that the defendant has duly filed in this court its petition praying for the removal of said cause to the circuit court of the United States of America for the district of Massachusetts, and also a satisfactory bond, pursuant to the statute of the United States, which has been approved by this court—

It is ordered that this cause be removed to the said circuit court in accordance with the prayer of the petition.

By the court: JOHN NOBLE, *Clerk.*
January 31, 1888.

This cause was thence continued to the October term of this court, A. D. 1888. On the twenty-fifth day of October, A. D. 1888, the following answer was filed in this circuit court:

26 *Answer of Western Union Telegraph Company.* (*Filed Oct.* 25, 1888.)

Tax of 1887.

This respondent, now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in said information contained, for answer thereto or to as much thereof as this defendant is advised is material or necessary for it to make answer to, answering, saith that this respondent is and before and on and since the twenty-fourth day of July, in the year 1866, was and has been a corporation chartered and organized in the State of New York under the laws of said State, having a capital stock divided into shares, which owns, controls, or uses lines of telegraph in various parts of the United States, of the Dominion of Canada, and the Atlantic Ocean, and in the said State of Massachusetts, constructed and maintained, as hereinafter set forth, in said State, mostly over and along the post roads of the United States which have been declared to be such by law, and over, under, and across the navigable streams or waters of said United States; that on the fifth day of June, in the year 1867, said company duly accepted and soon thereafter, to wit, on or about the twelfth day of June, in said year, duly filed its written acceptance with the Postmaster General of the United States of the restrictions and obligations required by law under and in accordance
27 with the act of the Congress of the United States of July 24th, 1868, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military, and other purposes."

That upon such filing it became entitled to and had and hath ever since had the right and franchise to construct, maintain, and operate lines of telegraph lines through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; and by and under said act and acceptance and filing the said company became and hath ever since been bound and obliged to give priority over all other business to telegrams between the several Departments of the Government of the United States and their officers and agents, and to sell all its telegraph lines, property, and effects to said United States at an appraised value.

And the respondent further says that its lines extend to and from said State of Massachusetts into and through most of the States and Territories of the United States, Washington, in the District of Columbia; the Dominion of Canada, and the Atlantic Ocean, and connect with those owned and established by the Government of the United States for public purposes, and that said company is in close communication with other telegraph companies doing busi-

ness in this country and abroad—that is to say, in and out of the United States and beyond seas.

And this respondent further avers that, in the exercise of the powers and privileges conferred upon it as aforesaid, it did, on and before and since the first day of May, 1887, rightfully construct, operate, and maintain lines of telegraph in various parts of said State, mostly upon, over, and along post roads of the United States declared to be such by law lying in said State of Massachusetts, and over, under, and across the navigable streams and waters of
28 said United States lying and being in said State, and did and does transact its general business and was engaged in the occupation and business of transporting messages over said lines and using the same for foreign and interstate commerce and the postal service and the business of the United States on and over said lines maintained on said post roads in said State, and on and over other lines of telegraph therewith connected owned and controlled or used and maintained by it in and through other parts and States of said United States, said Dominion, and said ocean. The said company thereby became and was and is an instrument of foreign and interstate commerce and a Federal agent for the transmission of commercial and other messages in general and of the business of the United States between points within said State of Massachusetts and points within other States of the United States, and over and through said State from and to and into other States of the United States, as well as from point to point within said State, and made and makes use of said lines on said post roads, and uses the franchises and privileges granted and secured to it by said act of July 24, 1866, on and over said post roads for foreign and interstate commerce and in the postal service of the United States, and in and for the service and business of the United States, which it is bound by law to render and perform and does continually and constantly render to said United States as aforesaid.

And this respondent further says that the actual cash value to this respondent of the said rights and franchises acquired, possessed, and used by it under said act of Congress as a whole or of such part thereof as is exercised within the State of Massachusetts cannot be determined, but this respondent avers that the same are of great value to it in the conduct of its general business of transmitting messages by telegraph, and do materially affect and largely increase the actual and the market value of the shares of its capital stock; and it further avers that the total fair cash value of all its property, real and personal, owned and used by it in said
29 State of Massachusetts, not including its said franchises, did not exceed on said first day of May, 1887, the sum of $426,484.30.

And this respondent further avers that the general court or Legislature of said State, with the approval of the Governor thereof, did, before said first day of May, 1887, enact in substance (but as more fully set forth in sections 38, 39, 40, 41, and 42 of chapter 13 of its Public Statutes, whereto this respondent prays that reference may be had as if fully and at length set forth herein) that this respond-

ent, as well as other like companies, should annually return to the tax commissioner of said State the amount of its capital stock, the number of shares thereof, and the par and market value of said shares on the first day of May, with a statement of the works, structures, real estate, and machinery owned by it and subject to local taxation within said State; also the whole length of its lines and the length of so much thereof as is or should be without said State; that said tax commissioner should ascertain from said return or otherwise the fair market value of such shares, and estimate therefrom the fair cash valuation of all of said shares constituting its capital stock on said first day of May, which should be taken as the true value (not of its property, but) of the corporate franchise of said company for the purposes of the tax hereinafter mentioned, and that this respondent should annually pay a tax to said State upon said corporate franchise (not upon its stock or property) at said valuation of said franchise equal to the aggregate value of the shares of its capital stock, ascertained, as aforesaid, as provided by said section 39, after deducting such portion of said valuation as should be proportional to the length of that part of its line lying without said State, and also deducting the value of that part only of its real estate and machinery located and subject to local taxation within said State.

And this respondent further says that, in submission to the demands and enactments of said State of Massachusetts, it did make such return in the words and figures set forth in the paper hereto annexed, marked "A," setting forth the facts therein stated, which this respondent avers to be true as so set forth, accompanied by a communication in its behalf to the Hon. Alanson W. Beard, treasurer and tax commissioner of said State, of which the paper hereto attached, marked "B," is a copy.

And this respondent, further answering, avers that the whole length of its said lines in said month of May within and without the said State did not exceed one hundred and fifty-two thousand two hundred and forty-three and $\frac{80}{100}$ (152,243.80) miles, and the whole length of its lines within said State not on, over, or along post roads of the United States, declared to be such by law, or over, under, or across the navigable streams or waters of the United States did not exceed six hundred and forty one $\frac{17}{100}$ (641.17) miles, and that all the remainder of its lines within said State (to wit, 2,258.55 miles) was on, over, or along such post roads or over, under, or across such streams or waters, and that this respondent then owned real estate without said State, located and subject to local taxation in other States and Territories of said United States or in said district, to the amount and value of $3,046,428.56, whereon local taxes were assessed and paid by the respondent in and for said year 1887 besides and in addition to taxes in said year assessed in different jurisdictions upon shares of its capital stock as the property of individuals.

And this respondent, further answering, says that said tax commissioner, acting for and in behalf of said State, did, under said statute, thereupon proceeded to assess a State tax upon this respondent substantially, in the manner set forth in the complainant's bill,

by valuing its capital stock (being 80,000 shares of the par value of 100 per share) from its market value, at $76 per share—

Or in all		$60,800,000 00
And deducting only—		
For its unissued shares	$15,941 00	
For stock in other companies outside of its system not included in said miles of line	8,192,643 35	
		8,208,584 00
(And nothing paid for real estate) leaving		52,591,416 00

And valuing the proportion thereof taxable in said State on said mileage basis at $\frac{28297}{52243}\frac{3}{80}$ths of said $52,591,416, or $1,001,685, upon which $1,001,685 a State tax of $15.06 per $1,000, being $15,085.38, was assessed to this respondent.

And this respondent avers that said statute declares that such valuation shall be taken as the true value of the corporate franchise of said company for the purpose of State taxation of said franchise, and does not provide or declare that said valuation is or shall be taken as the true value of the property owned and used by it in said State or purport or attempt to impose or assess said tax as a tax upon said property, and further avers that the supreme judicial court of said State and the Supreme Court of the United States have determined that said tax cannot be held valid unless it can be construed to be in the nature of an excise on the franchise of said company and not a tax on the property belonging to them, and that regarded as a tax on property the tax is plainly invalid and cannot be supported for a moment, as the law if construed as authorizing such a tax is in direct contravention of the constitution of said State.

And this respondent avers that said tax is wholly invalid and cannot be in any part sustained or collected as a tax on property owned and used by it in said State, if any, liable by suitable legislation and proceedings to be legally assessed, and that even if said tax was intended to be in effect a tax on this respondent on account of said property and could be sustained as such in the absence of evidence that it included other property not taxable, then this respondent avers that the mode of valuation and assessment prescribed by said statute described includes the full values of all the
32 franchises and powers vested in, acquired, possessed, used, and exercised by said company by or under said act of Congress of July 24, 1866, or otherwise, as well as the full value of all such property; that all said values are in said valuation and assessment indistinguishably and inseparably blended with each other so as to make a valuation largely in excess of the fair value of said property or of any property legally subject to taxation in said State, and are, as well as such tax, therefore unconstitutional and void.

Yet this respondent, although denying as aforesaid that the property owned or used by it in said State has been lawfully or constitutionally assessed, denying that anything is due from it on account

of said tax, as alleged in said bill, and not waiving any rights, does nevertheless say that it believes it ought to bear a just share and proportion of the public burdens in said State by an assessment under proper legislation and in a proper form at fair value on its real and personal property therein situated and used.

That it is ready and willing to pay to said State a tax at the rate per $1,000 (to wit, $15.06) fixed by said State upon the fair value of all its real and personal property situated, owned, and used by it in said State, to wit, on said $426,484.30 as aforesaid, not claiming that its actual tangible property is as such exempt from taxation because it is placed on post roads or navigable waters or is used for interstate commerce, and it prays leave of this court to bring and pay and by said leave doth bring and pay into said court for the use of the complainant, to be by it taken without condition or future objection, the sum of $7,176.49, being as aforesaid $15.06 per $1,000 of said $426,484.30, as the full and true value of all said property, with interest, at the rate of 12 per cent. per annum, thereon from the third day of November, A. D. 1887, to the time of said payment, together with $40.60, costs of this suit to said time, and the clerk's fees for such payment.

This respondent, further answering, admits that the tax commissioner of the Commonwealth, by a notice dated on the fourth day of October, 1887, notified, in accordance with the provisions of
33 the fifty-third section of said chapter, the treasurer of said corporation that a tax would be due and payable to the treasurer of the Commonwealth by said corporation in thirty days from the date of said notice; that the amount of said tax was $15,085.38, and also notified the treasurer of said corporation that within ten days from the date of said notice said corporation might apply for a correction of said tax and be heard thereon before the board of appeal provided in said chapter.

But, for the reasons aforesaid, this respondent submits and avers that said franchise tax of $15,085.38 assessed to and upon it is disproportional, illegal, unconstitutional, and void, and denies that it owes the same to said State or owes to it any interest thereon, and avers that this respondent ought not to be required to pay the same or to desist and refrain from the further prosecution of its business and the use and enjoyment of its said rights, privileges, and franchises, as prayed by said information.

THE WESTERN UNION TELEGRAPH COMPANY,
By NORVIN GREEN, *President.*

Filed Oct. 25, 1888.

"A."

JUNE 25, 1887.

To Hon. A. W. Beard, treasurer and tax commissioner of the Commonwealth of Massachusetts.

DEAR SIR: In behalf of the Western Union Telegraph Company I beg leave to submit herewith its return required by the 38th sec-

tion of the Public Statutes and refer you to a letter addressed to your predecessor in office in regard to the like return and tax on said company in the year 1885, dated June 27th, 1885.

Said company respectfully submits and protests that the
34 tax assessed upon said company in said year 1885 or in the year 1886, in said Commonwealth, or any tax assessed on the basis, net valuation, and principals on which that or any such tax was assessed was not, could not be, proportional or reasonable nor in conformity with, but was and would be in violation of and not allowed by, the Constitution and laws of the United States or of said Commonwealth, and was and would be illegal and void for many reasons, and among these reasons because, while in case of other corporations included in section 38 of said chapter a deduction is allowed as therein provided on account of the real estate and machinery subject to local taxation, wherever situated, no such deduction was allowed in fixing said tax in the years 1885 or 1886 of the value or on account of any real estate or machinery of said company situated out of said Commonwealth, although it owned, was assessed, and paid taxes on a large amount of such real estate in and for said years, and because there was included as in the length of its lines within said Commonwealth, in the estimate or valuation made under said section 40 of said chapter for the purpose of fixing said tax, lines of said company to a large amount built by authority and permission of the United States on post roads of the United States, as set forth in said letter; and said company does not admit but denies that such tax was or would be in any part or in any extent legal or valid.

But it is willing and desirous and offers, without prejudices to any right or claim of either party in any controversy, litigation, or proceedings in regard to said or any such tax, to pay into the treasury of said Commonwealth such amount as would be assessed to it as a tax on a basis of deducting from the valuation, ascertained as first provided by section 40 of said chapter, an amount equal to the value of its real estate subject to local taxation, wherever situated, which was, it avers, in 1885 $3,058,993.82 and in 1886 $3,044,282.34 and in 1887 $3,045,428.26, and not including for the purpose of such taxation any part of the length of its said lines in said Com-
monwealth on said post roads (but otherwise in accordance
35 with said chapter) for the years 1885, 1886, and 1887 respectively, such payment to be, of course, accepted and credited on account of any constitutional and legal liability for such tax. I beg leave to add that the company reserves the right to show in any controversy the full actual length of its lines on post roads and the full actual value of said real estate, if more than is stated in said return, and any other facts as to its lines or said real estate without being limited by said or any return made by it.

Yours very respectfully, GEO. S. HALE.

"B."

Western Union Telegraph Company, treasurer's office.

NEW YORK, *June 18th*, 1887.

Hon. Alanson W. Beard, tax commissioner of the Commonwealth of Massachusetts.

SIR: I, Roswell H. Rochester, treasurer of the Western Union Telegraph Company, hereby return that on the first day of May, 1887, said corporation held its principal place of business at the city of New York.

Its capital stock was	$81,200,000 00
The whole number of its shares was	812,000
The par value of each share was	$100 00
The market value of each share was	76 00
The value of the real estate owned by the corporation without the State of Massachusetts was	3,045,428 26
The value of the real estate owned by the corporation without the State of Massachusetts was	None.
The total number of miles of line owned or leased was	152,243.80
36 Of which the number of miles (not on post roads of the United States and excluding 2,258.55 miles which were on post roads of the United States) within the State of Massachusetts was	641.17
Total property, 812,000 shares, at $76 per share	$61,712,000 00
This includes:	
Real estate	3,046,428 26
209¾ shares held by this company, unissued, at 76	15,941 00
Stocks in other companies outside of our system not included in above statement of miles of line	8,192,643 35
Balance value of 152,243.80 miles of line	50,456,987 39
Value, at same rate, of said 641.17 miles as the valuation of the corporate franchise of said company for taxation under the laws of Massachusetts	212,498 02

This return included the lines and property of the American Union Telegraph Company, the Franklin Telegraph Company, the Mutual Union Telegraph Company, and the Gold and Stock Telegraph Company as part of the Western Union lines.

Respectfully yours, R. H. ROCHESTER, *Treasurer.*

37 On said twenty-fifth day of October, A. D. 1888, the defendant filed the following motion for leave to pay money into court:

Defendant's Motion for Leave to Pay Money into Court. (*Filed Oct.* 25, 1888.)

And now the defendant comes and moves the court that it may have leave, on such terms as this court shall fix, to bring the sum of

$7,176.49, being 15.05 per $1,000 on the sum of $426,484.30 mentioned in the answer in said case, with interest at the rate of 12 per cent. per annum thereon from the 3d day of November, 1887, to this day, October 25, 1888, inclusive, and $40.60 costs of said plaintiff, and also the fees of the clerk on such payment or amount, to the same effect as if allowed by the rule of this court in actions at law.

By its attorney, GEO. S. HALE.

The foregoing motion was allowed by the court on said twenty-fifth day of October, A. D. 1888, and the defendant thereupon paid into court $7,176.49 and $40.60 costs to date, taxed in favor of the plaintiff, and also the fees of the clerk on such payment.

On the twenty-seventh day of October, A. D. 1888, the following agreement was filed:

Agreement for Appointment of Master or Examiner. (*Filed Oct.* 27, 1888.)

In the above case it is consented that Francis S. Fiske, Esq., be appointed master or examiner.

H. C. BLISS,
Assistant Attorney General.
GEORGE S. HALE,
For Defendant.

38 On the twenty-ninth day of October, A. D. 1888, the foregoing agreement of the parties was allowed by the court and Francis S. Fiske, Esq., was appointed special examiner.

On the thirteenth day of November, A. D. 1888, the following replication was filed:

Replication. (*Filed Nov.* 13, 1888.)

And now comes the plaintiff and joins issue on the defendant's answer.

H. C. BLISS,
Assistant Attorney General.

This cause was thence continued from term to term to the present October term of this court, A. D. 1889, when, on the twenty-seventh day of December, the report of the examiner is filed, and this cause is set down for hearing and fully heard by the court upon the pleadings and the report of the examiner herein. On the twenty-ninth day of January, A. D. 1890, the court announced that upon the authority of the case of the Western Union Telegraph Company *v.* The Attorney General of the Commonwealth of Massachusetts, 125 U. S., 530, the plaintiff herein is entitled to a decree, and the terms thereof being settled, the following final decree is entered on the twenty-first day of February, A. D. 1890:

Final Decree. Feb. 21, 1890.

COLT, *J.:*

This case came on to be heard at this term of the court and was argued by counsel; and thereupon, on consideration thereof, it is now, to wit, the 21st day of February, A. D. 1890, by this court found, ordered, adjudged, and decreed as follows:

39 That the facts set forth in and shown by the examiner's report filed in this cause are true; that the method of valuation, assessment, and taxation provided by the laws of Massachusetts upon the franchise of the defendant corporation is not, as was claimed and contended by said defendant, illegal and unconstitutional under the constitution and laws either of the State of Massachusetts or the United States—that is to say, either under the Constitution of the United States, article one, section 8; article III, section 2; article VI, amendments V and XIV; under the Revised Statutes of the United States, sections 5263, 5264, 5265, 5266, 5267, 5268, 5269, including a revision and consolidation of the act of July 24, 1866, chapter 230, accepted by the defendant before the revision, or section 221, or under the constitution of said State, part I, art. X; part II, chapter I, section IV, or chapter 13 of its public statutes—but was and is in conformity with and authorized by said constitutions and laws, and that there was therefore due the plaintiff on the fifth day of November, 1887, the sum of $15,085.38; that the plaintiff is entitled to recover said sum and interest thereon from said November fifth, 1887, to October 25, 1888, at the rate of twelve per cent. per annum, amounting to 16,845.34, with $40.60 costs then accrued; that the defendant is entitled to have deducted from said amount as of said last-mentioned date the sum of $7,176.49 and the said $40.60 costs, said sum and costs having been on that day paid into court by defendant on its motion for leave to pay money into court, leaving due on said 25th day of October, 1888, the sum of $9,668.85; that the plaintiff recover said sum of $9,668.85, with interest thereon from said last-mentioned date, at the rate of twelve per cent. per annum, to the date of entry of this decree, amounting to $11,206.20, beside $37.14 costs accruing from October 25, 1888, and thereafter until payment interest on said amount of said judgment at the rate of six per cent. per annum.

By the court: JOHN G. STETSON, *Clerk.*

40 From this decree both parties in open court claim an appeal to the Supreme Court of the United States, and the defendant, waiving any security from the plaintiff, gives good and sufficient security to the plaintiff that it will prosecute its appeal to effect and answer all damages and costs if it fail to make its appeal good, and the said appeals of the plaintiff and of the defendant are respectively allowed.

A true record.

Attest: JOHN G. STETSON, *Clerk.*

41 UNITED STATES OF AMERICA, *Massachusetts District*, } *ss:*

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Tuesday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-nine, before the Honorable Le Baron B. Colt, circuit judge.

ATTORNEY GENERAL OF COMMONWEALTH OF MASSACHUSETTS, by Information, *v.* WESTERN UNION TELEGRAPH COMPANY. } No. 2629, Equity Docket.

This cause was begun in the supreme judicial court of the Commonwealth of Massachusetts for the county of Suffolk, and was removed to this circuit court upon the petition of the defendant and here entered at the May term, A. D. 1889.

Upon entry of said cause in this circuit court on the fifteenth day of May, A. D. 1889, certified copies of the following papers on file in said supreme judicial court were filed, namely: 1, information; 2, subpœna; 3, agreement for appearance of defendant; 4, petition for removal; 5, bond for removal; 6, order for removal.

42 1. *Information.* (*Filed in State Court Jan.* 16, 1889.)

Tax of 1888.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

To the honorable the justices of the supreme judicial court, sitting in equity:

Informing, showeth unto your honors Andrew J. Waterman, attorney general of the Commonwealth of Massachusetts, at the relation of Alanson W. Beard, treasurer and receiver general of said Commonwealth, for and on behalf of said Commonwealth, that the Western Union Telegraph Company is and from a time anterior to the first day of May, 1888, has been a corporation established and existing under the laws of the State of New York, having usual place of business at Boston, which owns or controls and uses, under lease or otherwise, a line of telegraph within said Commonwealth for purposes of business or profit, and having a capital stock divided into shares, and a corporation embraced within the provisions of section forty-two of chapter thirteen of the Public Statutes; that on the eighth day of October, 1888, in accordance with the provisions of said chapter, the tax commissioner of said Commonwealth, acting under the provisions of said chapter, duly ascertained and estimated the fair cash valuation of all the shares constituting the capital stock of said corporation, on the first day of May aforesaid; that said valuation thus ascertained and determined was, on said first day of May, 67,343,750.00 dollars; that said

tax commissioner also ascertained and determined that the credits to said corporation were, on said first day of May, of the value of $10,947,693; that the total number of miles of line of said corporation was 168,433.35, of which $165,410 were beyond the limits of said Commonwealth; that in accordance with the provisions of the 40th section of said chapter the total valuation of said stock, divided by the total number of miles of line and multiplied by the number of miles of line within the Commonwealth, gives the taxable value of the stock of said corporation within said Commonwealth; that the rate of taxation for said year 1883, duly determined in accordance with the provisions of the 40th section of said 13th chapter of the Public Statutes, was $14.68 *dollars* for and upon each one thousand dollars of valuation; that the tax commissioner, on the eighth day of October, 1888, notified, in accordance with the provisions of the 53d section of said chapter, the
43 treasurer of said corporation that a tax would be due and payable to the treasurer of the Commonwealth by said corporation in thirty days from the date of said notice, provided said tax should not be due and payable before the first day of November, 1888; that the amount of said tax was $14,361.09, and also notified the treasurer of said corporation that within ten days from the date of said notice said corporation might apply for a correction of said tax and be heard thereon before the board of appeal provided in this chapter.

And said attorney general at the relation aforesaid says that by virtue of said statute and said proceedings said corporation became liable and was bound to pay to the treasurer of the said Commonwealth said tax in thirty days from the date of said notice: Provided, however, that said tax should not be payable before the first day of November, 1888, but that said corporation has not paid said taxes to said treasurer of the Commonwealth or any portion thereof, and has neglected and failed to pay the same, and still owes the same to said Commonwealth and interest thereon at the rate of twelve per cent per annum.

Whereupon, pursuant to said statute, your informant prayeth your honors to order and decree that said sum due for taxes as aforesaid shall be paid to said Commonwealth by the said corporation, with interest thereon, together with the cost of this information; and your informant prayeth your honors to grant unto said Commonwealth such other and further relief in the premises as the nature of the circumstances of this case may require and to your honors shall seem meet.

And to the end that the Western Union Telegraph Company may full and true answer make to all and singular the matters as aforesaid, may it please your honors to grant unto your informant a writ of subpœna, to be directed to the said corporation, thereby commanding it, at a certain time and under a certain penalty therein to be limited, to appear before this honorable court and then and there full, true, direct, and perfect answer make to all and singular
44 the premises, and, further, to stand to, perform, and abide

such further order, direction, and decree therein as to your honors shall seem meet.

A. J. WATERMAN,
Attorney General.

2. Subpœna.
3. Agreement for appearance of defendant.
4. Petition for removal.
5. Bond for removal.

(MEMORANDUM.—By direction of counsel for both parties, the above papers, 2 to 5, inclusive, are omitted in this record.—John G. Stetson, clerk.)

6. *Order for Removal.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Supreme Judicial Court. In Equity.

ATTORNEY GENERAL *ex Rel.* TREASURER OF COMMONWEALTH
v.
WESTERN UNION TELEGRAPH COMPANY.

And now in the above-entitled cause, it appearing to the
45 court that the defendant has duly filed in this court its petition praying for the removal of said cause to the circuit court of the United States of America for the district of Massachusetts, and also a satisfactory bond pursuant to the statute of the United States, which has been approved by this court, it is ordered that this cause be removed to the said circuit court in accordance with the prayer of the petition.

By the court: JOHN NOBLE, *Clerk.*

May 3, 1889.

On the sixteenth day of July, A. D. 1889, the following answer was filed in this circuit court:

Answer of Western Union Telegraph Company. (*Filed July* 16, 1889.)

Tax of 1888.

This respondent, now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in said information contained, for answer thereto, or to so much thereof as this respondent is advised is material or necessary for it to make answer to, answering, saith that this respondent is and before and on and since the twenty-fourth day of July, in the year 1866, was and has been a corporation chartered and organized in the State of New York under the laws of said State,

having a capital stock divided into shares, which owns, con-
46 trols, or uses lines of telegraph in various parts of the United States, of the Dominion of Canada, and the Atlantic Ocean, and in the said State of Massachusetts, constructed and maintained, as heretofore set forth, in said State, mostly over and along the post roads of the United States which have been declared to be such by law, and over, under. and across the navigable streams or waters of said United States; that on the fifth day of June, in the year 1867, said company duly accepted and soon thereafter, to wit, on or about the twelfth day of June, in said year, duly filed its written acceptance with the Postmaster General of the United States of the restrictions and obligations required by law under and in accordance with the act of the Congress of the United States of July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes."

That upon such filing it became entitled to and had and hath ever since had the right and franchise to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; and by and under said act and acceptance and filing the said company became and hath ever since been bound and obliged to give priority over all other business to telegrams between the several Departments of the Government of the United States and their officers and agents, and to sell all its telegraph lines, property, and effects to said United States at an appraised value.

And the respondent further says that its lines extend to and from said State of Massachusetts into and through most of the States and Territories of the United States, Washington, in the District of Columbia, the Dominion of Canada, and the Atlantic Ocean, and connect with those owned and established by the Government of the United States for public purposes, and that said company is
47 in close communication with other telegraph companies doing business in this country and abroad—that is to say, in and out of the United States and beyond seas.

And this respondent further avers that in the exercise of the powers and privileges conferred upon it as aforesaid it did, on and before and since the first day of May, 1888, rightfully construct, operate, and maintain lines of telegraph in various parts of said State, mostly upon, over, and along post roads of the United States, declared to be such by law, lying in said State of Massachusetts, and over, under, and across the navigable streams and waters of said United States lying and being in said State, and did and does transact its general business and was engaged in the occupation and business of transporting messages over said lines and using the same for foreign and interstate commerce and the postal service and the business of the United States on and over said lines maintained on said post roads in said State and on and over other lines of telegraph

therewith connected owned and controlled or used and maintained by it in and through other parts and States of said United States, said Dominion, and said ocean. The said company thereby became and was and is an instrument of foreign and interstate commerce and a Federal agent for the transmission of commercial and other messages in general and of the business of the United States between points within said State of Massachusetts and points within other States of the United States and over and through said State from and to and into other States of the United States, as well as from point to point within said State, and made and makes use of said lines on said post roads and uses the franchises and privileges granted and secured to it by said act of July 24, 1866, on and over said post roads for foreign and interstate commerce and in the postal service of the United States and in and for the service and business of the United States, which it is bound by law to render and perform and does continually and constantly render to said United States as aforesaid.

48 And this respondent further says that the actual cash value to this respondent of the said rights and franchises acquired, possessed, and used by it under said act of Congress as a whole or of such part thereof as is exercised within the State of Massachusetts cannot be determined, but this respondent avers that the same are of great value to it in the conduct of its general business of transmitting messages by telegraph and do materially affect and largely increase the actual and the market value of the shares of its capital stock; and it further avers that the total fair cash value of all its property, real and personal, owned and used by it in said State of Massachusetts, not including its said franchises, did not exceed on said first day of May, 1888, the sum of 464,466.20 dollars.

And this respondent further avers that the general court or Legislature of said State, with the approval of the Governor thereof, did, before said first day of May, 1888, enact in substance (but as more fully set forth in sections 38, 39, 40, 41, and 42 of chapter 13 of its Public Statutes, whereto this respondent prays that reference may be had as if fully and at length set forth herein) that this respondent, as well as other like companies, should annually return to the tax commissioner of said State the amount of its capital stock, the number of shares thereof, and the par and market value of said shares on the first day of May, with a statement of the works, structures, real estate, and machinery owned by it and subject to local taxation within said State; also the whole length of so much thereof as is or should be without said State; that said tax commissioner should ascertain from said return or otherwise the fair market value of said shares and estimate therefrom the fair cash valuation of all of said shares constituting its capital stock on said first day of May, which should be taken as the true value (not of its property, but) of the corporate franchise of said company for the purposes of the taxation hereinafter mentioned, and that this respondent should annually pay a tax of said State upon said corporate franchise (not

49 upon its stock or property), at said valuation of said franchise, equal to the aggregate value of the shares of its capital stock,

ascertained as aforesaid, as provided by said section 39, deducting such portion of said valuation as should be proportional to the length of that part of its line lying without said State, and also deducting the value of that part only of its real estate and machinery located and subject to local taxation within said State.

And this respondent further says that, in submission to the demands and enactments of said State of Massachusetts, it did make such return in the words and figures set forth in the paper hereto annexed, marked "A," setting forth the facts therein stated, which this respondent avers to be true as so set forth, accompanied by a communication in its behalf to the Hon. Alanson W. Beard, treasurer and tax commissioner of said State.

And the respondent, further answering, avers that the whole length of its said lines in said month of May within and without said State did not exceed one hundred and sixty-eight thousand four hundred and thirty-three and $\frac{35}{100}$ (168,433.35) miles, and the whole length of its lines within said State not on, over, or along post roads of the United States declared to be such by law, or over, under, or across the navigable streams or waters of the United States, did not exceed seventy-four (74) miles, and that all the remainder of its lines within said State (to wit, 2,949.46 miles) was on, over, or along such post roads or over, under, or across such streams or waters, and that this respondent then owned real estate without said State, located and subject to local taxation in other States and Territories of said United States or in said district, to the amount and value of $3,043,756.32, whereon local taxes were assessed and paid by the respondent in and for said year 1886, besides and in addition to taxes in said year assessed in different jurisdictions upon shares of its capital stock as the property of individuals.

And this respondent, further answering, says that said tax commissioner, acting for and in behalf of said State, did under said statute thereupon proceed to assess a State tax upon this re-
50 spondent substantially in the manner set forth in the complainant's bill by valuing its capital stock, being 862,000 shares of the par value of 100 per share, from its market value of

$78.12½ per share, or in all-----	$67,343,750	$67,343,750
And deducting only for its unissued shares ----------	20,351 71	
For stocks in other companies outside of its system not included cluded in said miles of line----	10,927,340 93	
		10,947,602 64
And nothing for said estate, leaving ----------		$56,396,057 36

And valuing the proportion thereof taxable in said State on said mileage basis at $\frac{30234637}{168433357}$ths of said $56,396,057.36, or $1,012,336, upon which $1,012,336 a State tax of $14.68 per $1,000, being $14,861.09, was assessed to this respondent.

And this respondent avers that said statute declares that such valuation shall be taken as the true value of the corporate franchise

of said company for the purpose of State taxation of said franchise, and does not provide or declare that said valuation is or shall be taken as the true value of the property owned and used by it in said State or purport or attempt to impose or assess said tax as a tax upon said property; and further avers that the supreme judicial court of said State and the Supreme Court of the United States have determined that said tax cannot be held valid unless it can be construed to be in the nature of an excise on the franchise of said company and not a tax on the property belonging to them, and that, regarded as a tax on property, the tax is plainly invalid and cannot be supported for a moment, as the law, if construed as authorizing such a tax, is in direct contravention of the constitution of said State.

And this respondent avers that said tax is wholly invalid and cannot be in any part sustained or collected as a tax on property owned and used by it in said State, if any, liable by suitable legislation and proceedings to be legally assessed, and that even
51 if said tax was intended to be in effect a tax on this respondent on account of said property and could be sustained as such in the absence of evidence that it included other property not taxable, then this respondent avers that the mode of valuation and assessment prescribed by said statute does in fact include the full values of all the franchises and powers vested in, acquired, possessed, used, and exercised by said company by or under said act of Congress of July 24, 1866, or otherwise, as well as the full value of all such property; that all said values are in said valuation and assessment indistinguishably and inseparably blended with each other so as to make a valuation largely in excess of the fair value of said property or of any property legally subject to taxation in said State and are, as well as such tax, therefore unconstitutional and void.

And this respondent, further answering, avers that the basis upon which the tax here sought to be collected is assessed is erroneous and said tax invalid, among other things, for the further reason that no account is taken or credit given to this respondent of or for the good-will of its business which exists and is taxable only in and by the State of New York, in which this respondent has its domicile and by which it was chartered and granted its franchises.

Yet this respondent, although denying as aforesaid that the property owned or used by it in said State has been lawfully or constitutionally assessed, denying that anything is due from it on account of said tax, as alleged in said bill, and not waiving any rights, does, nevertheless, say that it believes it ought to bear a just share and proportion of the public burdens in said State by an assessment, under proper legislation and in a proper form, at fair values, on its real and personal property therein situated and used.

That it is ready and willing to pay to said State a tax at the rate per 1,000 (to wit, $14.68) fixed by said State upon the fair value of all its real and personal property situated, owned, and used by it in said State, to wit, on said $464,466.20 as aforesaid, not claim-
52 ing that its actual tangible property is as such exempt from taxation because it is placed on post roads or navigable waters

or is used for interstate commerce, and it prays leave of this court to bring and pay and by said leave doth bring and pay into said court for the use of the complainant, to be by it taken without condition or future objection, the costs of this suit to such payment and the sum of $6,818.36, being as aforesaid $14.68 per $1,000 of said $464,466.20 (as the full and true value of all said property), with interest, at the rate of 12 per cent. per annum thereon, from the eighth day of November, A. D. 1888, to January 3d, 1889, at which time the respondent did tender to the plaintiff the said sum of $6,818.36, with said interest, being $129.54, and in all $6,947.90, without conditions, but not waiving the right to object to and not admitting the validity or legality of said tax to any extent.

This respondent, further answering, admits that the tax commissioner of the Commonwealth, by a notice dated on the eighth day of October, 1888, notified, in accordance with the provisions of the fifty-third section of said chapter, the treasurer of said corporation that a tax would be due and payable to the treasurer of the Commonwealth by said corporation in thirty days from the date of said notice; that the amount of said tax was $14,861.09, and also notified the treasurer of said corporation that within ten days from the date of said notice said corporation might apply for a correction of said tax and be heard thereon before the board of appeal provided in said chapter.

But, for the reasons aforesaid, this respondent submits and avers that said franchise tax of $14,961.09 assessed to and upon it is disproportional, illegal, unconstitutional, and void, and denies that it owes the same to said State or owes to it any interest thereon, and avers that this respondent ought not to be required to pay the same as prayed by said information.

All which matters and things this respondent is ready and willing to aver, prove, and maintain as this honorable court shall
53 direct, and humbly prays to be hence dismissed with its reasonable costs and charge in this behalf most wrongfully sustained.

Dated 15th day of July, A. D. 1889.

THE WESTERN UNION TELEGRAPH COMPANY,
By NORVIN GREEN, *President.*

Filed July 21, 1889.

A.

Western Union Telegraph Company, treasurer's office.

NEW YORK, *July 17th*, 1888.

Hon. Alanson W. Beard, tax commissioner of the Commonwealth of Massachusetts.

SIR: I, Roswell H. Rochester, treasurer of the Western Union Telegraph Company, a corporation created by the State of New York, which has filed with the Postmaster General of the United States its written acceptance of the restrictions and obligations of the act of

Congress, approved July 24th, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military, and other purposes," hereby return that on the 1st day of May, 1888, said corporation had its principal place of business in the city of New York, in said State:

Its capital stock was	$86,200,000
The whole number of its shares was	862,000
The par value of each share was	$100
The market value of each share was	78 12½
The market value of the real estate owned by the corporation without the State of Massachusetts was	3,043,756 32
54 The value of the real estate owned by the corporation within the State of Massachusetts was	Nothing.
The total number of miles owned or leased without and within the State was	168,433.33
Of which the number of miles (not on post roads of the United States and excluding miles which were on post roads of the United States, to wit, 2,141.42 miles on railroad and 808.04 miles on highways) within the State of Massachusetts was	74
Total property, 862,000 shares, at $78.12½ per share, equals	67,343,750 00
This includes:	
Real estate	3,043,756 32
260.52 shares held by this company unissued at $78.12½	20,351 71
Stocks in other companies outside of our system	10,927,340 98
Balance being the value of 168,433.35 miles of line and franchises	53,352,301 04
Value at same rate of said 74 miles not post roads as the valuation of the corporate franchise of said company for taxation under the laws of Massachusetts	23,439 50
The value of the said 3,023.46 miles of line within the State of Massachusetts on said 1st day of May was	412,888 65
The value of the instruments, batteries, office fixtures, and furniture and all tangible personal property within said State on said 1st day of May was	51,577 55

This return includes the lines and property of the American Union Telegraph Company, the Franklin Telegraph Company, the Mutual Union Telegraph Company, the Gold and Stock Tele-
55 graph Company, and the Baltimore and Ohio Telegraph Company, as parts of the Western Union Telegraph Company's line.

Respectfully yours, R. H. ROCHESTER, *Treas.*

5—1578

On the eighteenth day of July, A. D. 1889, the defendant filed the following motion for leave to pay money into court:

Defendant's Motion for Leave to Pay Money Into Court. (*Filed July* 18, 1889.)

And now the defendant comes and moves the court that it may have leave, on such terms, if any, as this court shall fix, to bring the sum of $6,818.36 on account of the tax assessed by said Commonwealth of Massachusetts or its tax commissioner upon said company in the year 1888, as alleged in said information, said sum of $6,818.36 being $14.68 per $1,000 of $464,466.20, with interest, at the rate of 12 per cent. per annum, thereon from the eighth day of November, A. D. 1888, to the third day of January, 1889 (both days inclusive), on which last therein-mentioned day this respondent did offer to the plaintiff the said sum of $6,818.36, with said interest, being $129.54, and in all $6,947.90, in terms as follows:

The Western Union Telegraph Company, by its attorney, George S. Hale, this day tendered to the Commonwealth of Massachusetts, through its treasurer, the sum of ($6,947.90) six thousand nine hundred and forty-seven and $\frac{90}{100}$ dollars on account of tax assessed by said Commonwealth or its tax commissioner upon the said company in the year 1888 and claimed to be due November 7, 1888, with interest, without conditions, but not waiving the right to object to and not admitting the validity or legality of the said
56 tax to any extent. All objections to the money, currency, or form in which said tender was made were waived.

January 3, 1889.

I admit that G. S. Hale, att'y for Western Union Telegraph Co., presented to the State treasurer $6,947.90 under the conditions above stated, which amount was not accepted.

H. C. BLISS,
Ass't Att'y Gen.

Jan. 3, 1889.

to the same effect as allowed by the rule of this court in actions at common law.

HALE & FISKE,
For Defendant.

Acknowledgment of Receipt of Money by Commonwealth Accompanying Motion Filed July 18, 1889.

The Commonwealth of Massachusetts, by its attorney general, has this day received the sum of $6,947.90 mentioned in the foregoing motion, together with the costs therein mentioned, being $40, and accepts the same to the same effect as if paid into court upon the allowance and granting of said motion.

H. C. BLISS,
Assistant Attorney General.

This cause was thence continued to this present October term, A. D. 1889. On the twenty-fourth day of October, A. D. 1889, the following replication was filed:

Replication. (*Filed Oct.* 24, 1889.)

And now comes the plaintiff and joins issue on the defendant's answer.

H. C. BLISS,
Assistant Attorney General.

57 On said twenty-fourth day of October, A. D. 1889, Francis S. Fiske, Esq., is appointed special examiner herein. On the twenty-seventh day of December the report of the examiner is filed, and this cause is set down for hearing and fully heard by the court, upon the pleadings and the report of the examiner herein. On the twenty-ninth day of January, A. D. 1890, the court announced that, upon the authority of the case of The Western Union Telegraph Company *v.* The Attorney General of the Commonwealth of Massachusetts, 125 U. S., 530, the plaintiff herein is entitled to a decree, and, the terms thereof being settled, the following final decree is entered on the twenty-first day of February, A. D. 1890:

Final Decree. Feb. 21, 1890.

COLT, *J.:*

This case came on to be heard at this term of the court and was argued by counsel, and thereupon, in consideration thereof, it is now, to wit, the 21st day of February, A. D. 1890, by this court found, ordered, adjudged, and decreed as follows:

That the facts set forth in and shown by the examiner's report filed in this cause are true; that the method of valuation, assessment, and taxation provided by the laws of Massachusetts upon the franchise of the defendant corporation is not, as was claimed and contended by said defendant, illegal and unconstitutional under the Constitution and laws either of the State of Massachusetts or the United States—that is to say, either under the Constitution of the United States, article one, section 8; article III, section 2; article VI, amendments V and XIV; under the Revised Statutes of the United States, sections 5263, 5264, 5265, 5266, 5267, 5268, 5269, including a revision and consolidation of the act of July 24, 1866, chapter 230, accepted by the defendant before the revision, or section 221, or under the constitution of said State, part I, art.
58 X; part II, chapter I, section IV, or chapter 13 of its Public Statutes—but was and is in conformity with and authorized by said Constitutions and laws, and that there was therefore due the plaintiff on the ninth day of November, 1888, the sum of $14,861.09; that the plaintiff is entitled to recover said sum and interest thereon from said November ninth, 1888, to July 18, 1889, at the rate of twelve per cent. per annum, amounting to $16,094.56, with $40, costs

then accrued; that the defendant is entitled to have deducted from said amount as of said last-mentioned date the sum of $6,947.90 and the said $40, costs, said sum and costs having been on that day paid into court by defendant on its motion for leave to pay money into court, leaving due on said 18th day of July, 1889, the sum of $9,146.66; that the plaintiff recover said sum of $9,146.66, with interest thereon from said last-mentioned date, at the rate of twelve per cent. per annum, to the date of entry of this decree, amounting to $9,796.07, beside $35.98, costs accruing from October 25, 1888, and thereafter until payment interest on said amount of said judgment at the rate of six per cent. per annum.

By the court: JOHN G. STETSON, *Clerk*.

From this decree both parties in open court claim an appeal to the Supreme Court of the United States, and the defendant, waiving any security from the plaintiff, gives good and sufficient security to the plaintiff that it will prosecute its appeal to effect and answer all damages and costs if it fail to make its appeal good, and the said appeals of the plaintiff and of the defendant are respectively allowed.

A true record.

Attest: JOHN G. STETSON, *Clerk*.

59 The following is the report of Francis S. Fiske, the special examiner in each of the foregoing cases:

Report of Special Examiner. (*Filed Dec.* 27, 1889.)

Circuit Court of the United States, District of Massachusetts.

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, by Information,
vs.
WESTERN UNION TELEGRAPH COMPANY.
} 3 Cases (Taxes of 1886, 1887, and 1888).

I, Francis S. Fiske, having been appointed by the court special examiner in each of the above-entitled causes, do report—

60 That the informations in each of the said causes were filed in the supreme judicial court of the State of Massachusetts as follows, viz: In the suits for the collection of the taxes of 1886 and 1887 on the 20th day of December, 1887, and in the suits for the collection of the tax of 1888 on the 16th day of January, 1889; that each of the said causes *were* duly removed into this court by the defendant; that the defendant is a telegraph company organized under and by virtue of the laws of the State of New York before the passage of the act of the Congress of the United States, passed July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military, and other purposes" (see U. S. Revised Statutes, title LXV, section 5263 *et seq.*), and is a corporation organized for purposes of business and profit, having a capital stock divided into

shares, and that said defendant duly filed with the Postmaster General of the United States its written acceptance of the restrictions and obligations required by law in accordance with said act on or about the 12th day of June, 1867, and has ever since been and now is in existence and operation.

That said act of July 24, 1866, was duly accepted by the following telegraph companies, by their respective officers, mentioned upon the dates stated, to wit:

1. The American Submarine Telegraph Company of New York, N. Y.; received and filed July 24, 1866.

2. The National Telegraph Company of New York, N. Y.; received and filed July 30, 1866.

3. The Globe Insulated Lines Telegraph Company of New York, N. Y.; received and filed July 31, 1866.

4. International Telegraph Company of Portland, Me.; received and filed October 6, 1866.

5. The Atlantic and Pacific Telegraph Company of New York, N. Y.; received and filed March 19, 1867.

61 6. The Franco-American Land and Ocean Telegraph Company of New York, N. Y.; received and filed April 6, 1867.

7. The Globe Telegraph Company of New York; received and filed May 30, 1867.

8. Mississippi Valley National Telegraph Company of St. Louis, Mo.; received and filed June 4, 1867.

9. Western Union Telegraph Company of New York; received and filed June 8, 1867.

10. Northwestern Telegraph Company of Kenosha, Wis.; received and filed July 30, 1867.

11. Great Western Telegraph Company of New York; received and filed January 17, 1868.

12. The Franklyn Telegraph Company of Boston, Mass.; received and filed April 17, 1868.

13. The Insulated Lines Telegraph Company of Boston, Mass.; received and filed April 13, 1868.

14. Pacific and Atlantic Telegraph Company of Pittsburgh, Pa.; received and filed July 22, 1868.

15. The Atlantic and Pacific States Telegraph Company of Sacramento, Cal.; received and filed September 7, 1868.

16. The Eastern Telegraph Company of Philadelphia, Pa.; received and filed October 5, 1868.

17. The Delaware River Telegraph Company of Philadelphia, Pa.; received and filed October 23, 1868.

18. Cape May and Shore Telegraph Company of New York City; received and filed April 2, 1869.

19. Peninsula Telegraph Company of New York City; received and filed May 9, 1869.

20. Ocean Telegraph Company of Boston, Mass.; received and filed July 15, 1869.

21. The American Cable Company of New York; received and filed April 15, 1870.

62 22. Southern and Atlantic Telegraph Company of Philadelphia, Pa.; received and filed July 22, 1870.

23. International Ocean Telegraph Company of New York City; received and filed January 20, 1871.

24. Missouri River Telegraph Company of Sioux City, Iowa; received and filed May 3, 1871.

25. The Marine and Inland Telegraph Company of New Jersey, 715 Locust street, Philadelphia; received and filed November 27, 1872.

26. Atlantic and Pacific Telegraph Company of Missouri; executive office 145 Broadway, New York city; received and filed May 8, 1877.

27. New Jersey and New England Telegraph Company; received and filed November 21, 1878. Address A. L. Worthington, No. 10 Green street, Trenton, N. J.

28. The American Rapid Telegraph Company, 41 Wall street, New York; received and filed April 12, 1879. Special rates received and filed April 1, 1881.

29. Central Union Telegraph Company, 145 Broadway, New York; received and filed May 9, 1879.

30. New York Land and Ocean Telegraph Company; received and filed May 10, 1879.

31. Deseret Telegraph Company, Salt Lake City, Utah; received and filed May 19, 1879.

32. American Union Telegraph Company of New York, 145 Broadway, New York; received and filed July 1, 1879.

33. The American Union Telegraph Company of Missouri, Chas. S. Greeley, president, St. Louis, Mo.; received and filed July 9, 1879.

34. Wabash Railway Company, Cyrus W. Field, president, New York; received and filed July 11, 1879.

35. The American Union Telegraph Company of New Jersey, D. H. Bates, president, Jersey City, N. J.; received and filed July 17, 1879.

63 36. The Baltimore and Ohio Railroad Company of Maryland, John W. Garrett, president, Baltimore, Md.; received and filed July 18, 1879.

37. The American Union Telegraph Company of Baltimore City, Md.; received and filed July 31, 1879.

38. The Deer Lodge Telegraph Company of Butte City, Mont.; received and filed August 30, 1879.

39. The American Union Telegraph Company of Pennsylvania, D. H. Bates, president, Philadelphia; received and filed September 4, 1879.

40. The American Union Telegraph Company of Indiana, La Fayette, Ind.; received and filed Sept. 12, 1879.

41. The Cheyenne and Black Hills Telegraph Company, W. H. Hibbard, superintendent, Cheyenne, Wyoming; received and filed November 7, 1879.

42. The American Union Telegraph Company of Ohio, Frank B.

Swayne, president, Toledo, Ohio; received and filed November 8, 1879.

43. The American Union Telegraph Company of Louisiana, Ed. Le Loup, secretary, New Orleans, La.; received and filed March 1, 1880.

44. Baltimore and Ohio Telegraph Company of Ohio, Geo. Hoadley, president, Cincinnati, Ohio; received and filed September 3, 1880.

45. The Wabash, St. Louis and Pacific Railway Company of St. Louis, Mo., Solon Humphreys, president, No. 80 Broadway, New York; received and filed September 13, 1880.

46. Baltimore and Ohio Telegraph Company of Illinois, C. H. Hudson, president, No. 81 South Clark street, Chicago, Ill.; received and filed September 23, 1880.

47. Frontier Telegraph Company of Texas, G. O. Appleby, president, Lampasas, Texas; received and filed October 25, 1880.

48. Bankers' and Merchants' Telegraph Company of New
64 Jersey, J. Heron Crossman, president, No. 58 Broadway, New York, N. Y.; received and filed April 21, 1881.

49. Bankers' and Merchants' Telegraph Company of New York, Wm. B. Maris, president, No. 58 Broadway, New York, N. Y.; received and filed June 8, 1881.

50. Mutual Union Telegraph Company of Illinois, Carroll Sprigg, secretary, Chicago, Ill.; received and filed October 24, 1881.

51. Mutual Union Telegraph Company of Missouri, Carroll Sprigg, secretary, Chicago, Ill.; received and filed November 14, 1881.

52. New Jersey Mutual Telegraph Company, Jno. H. Walker, secretary, Newark, N. J.; received and filed November 17, 1881.

53. Bankers' and Merchants' Telegraph Company, Wm. M. Maris, president, 58 Broadway, New York; received and filed December 8, 1881.

54. The Baltimore and Ohio Telegraph Company, Welty McCullogh, secretary, Pittsburgh, Pa.; received and filed March 6, 1882.

55. East Tennessee Telephone Company, D. I. Carson, secretary, New York; received and filed May 31, 1882.

56. Southern Telegraph Company, James F. Cox, president, 48 Exchange Place, New York; received and filed August 4, 1882.

57. Postal Telegraph Company, A. W. Beard, president, 2 Wall street, New York; received and filed Aug. 31, 1882.

58. Bankers' and Merchants' Telegraph Company of Baltimore City, J. G. Case, secretary, 58 Broadway, New York; received and filed December 14, 1882.

59. Mutual Union Telegraph Company of New York, John G. Moore, president; received and filed March 5, 1883.

60. The Baltimore and Ohio Telegraph Company in Pennsylvania, J. B. Washington, secretary, Pittsburgh, Pa.; received and filed March 17, 1883.

65 61. The Baltimore and Ohio Telegraph Company of Indiana, Geo. P. Frick, president; Dan'l T. Downey, secretary; received and filed July 17, 1883.

62. The Baltimore and Ohio Telegraph Company of the State of New York, Geo. P. Frick, president; Edward R. Golliday, secretary; received and filed July 17, 1883.

63. The Northern and Southern Telegraph Company, corner of State and Bridge streets, New York city, John F. Davis, president; Wm. H. Harfield, secretary; received and filed September 28, 1883.

64. Baltimore and Ohio Telegraph Company of New Jersey, Geo. P. Frick, president; Edward R. Golliday, secretary; received and filed November 7, 1883.

65. National Telegraph Company of New York, Calvin S. Brice, president; F. E. Worcester, secretary; received and filed January 31, 1884.

66. Philadelphia and Seaboard Telegraph Company of New Jersey, Milton Cowperthwaite, secretary; received and filed February 23, 1884.

67. Providence and Pascoag Telegraph Company of Rhode Island, D. H. Bates, president, New York; F. Jessen, secretary; received and filed July 10, 1884.

68. Baltimore and Ohio Telegraph Company of Missouri, Geo. P. Frick, president, Baltimore, Md.; received and filed July 18, 1884.

69. Baltimore and Ohio Telegraph Company of Louisiana, D. H. Bates, president, Baltimore, Md.; received and filed July 25, 1884.

70. The New England Telegraph Company, F. A. McKeone, president, New York; received and filed July 26, 1884.

71. The Baltimore and Ohio Telegraph Company of Texas, D. H. Bates, president, New York; received and filed August 13, 1884.

66 72. The New England Telegraph Company of Massachusetts, Dan. S. Robeson, New York, vice-president; received and filed September 5, 1884.

73. The Chesapeake and Ohio Telegraph Lines, C. W. Smith, general manager, Richmond, Va.; received and filed September 29, 1884.

74. The Baltimore and Ohio Telegraph Company of Massachusetts, D. H. Bates, president, Boston, Mass.; received and filed December 15, 1884.

75. The Postal Telegraph and Cable Company, Henry Rosener, second vice-president, New York; received and filed January 29, 1885.

76. The Pacific Telegraph Company, George H. Myers, secretary, Kansas City, Mo.; received and filed July 27, 1885.

77. The Baltimore and Ohio Telegraph Company of Baltimore County, Maryland, D. H. Bates, president, Baltimore, Md.; received and filed February 20, 1886.

78. Postal Telegraph Cable Company, Jas. H. Withington, president, New York; received and filed April 6, 1886.

79. The North American Telegraph Company, W. H. Eustis, secretary, Minneapolis, Minn.; received and filed April 22, 1886.

80. The San Juan Telegraph Company, W. E. Block, secretary, Ouray, Colorado; received and filed June 9, 1886.

81. Pacific Postal Telegraph Cable Company, Henry Rosener, president, New York, N. Y.; received and filed July 20, 1886.

82. The Baltimore and Ohio Telegraph Company of Pennsylvania, R. Duryea, secretary, Baltimore, Md.; received and filed September 11, 1886.

83. The Manhattan Railway Company, D. W. McWilliams, secretary, New York, N. Y.; received and filed October 6, 1886.

84. The Pacific Mutual Telegraph Company, George M. Myers, secretary, Rosedale, Kans.; received and filed February 24, 1887.

67 85. The Empire and Bay State Telegraph Company, Henry Macdona, secretary, New York, N. Y.; received and filed July 12, 1887.

86. The Spokane Falls and Wardner Telephone-Telegraph Lines, W. S. Norman, owner, Spokane Falls, Washington Territory; received and filed August 17, 1887.

87. The Rocky Mountain Telegraph Company, W. M. Cairnes, general manager, Butte, Mont.; received and filed August 18, 1887.

88. The Central Arizona Telegraph Company, L. H. Wilson, president, Prescott, Ariz.; received and filed October 6, 1887.

89. W. S. Norman's U. S. Military Telegraph Line, between Fort Cœur d'Alene and Spokane Falls, W. S. Norman, Spokane Falls, Washington Territory; received and filed October 13, 1887.

90. The Wyoming Inland Telegraph Company, F. B. Proctor, secretary, Buffalo, Wyoming; received and filed October 19, 1887.

91. The Chicago Postal Telegraph Company, Marcus Pollasky, president, Chicago, Ill.; received and filed January 3, 1888.

92. The Western Union Telegraph Company of Baltimore City, Richard J. Bloxam, president, Baltimore, Md.; received and filed January 7, 1889.

93. The Southern Bell Telephone and Telegraph Company, D. I. Carson, secretary, 195 Broadway, New York; received and filed February 18, 1889.

94. The Washington and Idaho Telegraph Company, E. B. Spencer, secretary, Spokane Falls, Washington; received and filed May 11, 1889.

95. The Continental Telegraph Company, E. L. Martin, president, Kansas City, Mo.; received and filed May 27, 1889.

96. The Maryland Central Railway Company, C. F. Kerchner, secretary, Baltimore, Md.; received and filed September 6, 1889.

68 That on and before and since the 1st day of May, 1886, the defendant owned, controlled, and operated under lease or otherwise a line or lines of telegraph within said Commonwealth as part of a system of 151,152.30 miles of line extending throughout the United States, a part of Canada, and to Cuba and to England by submarine ocean cable, connecting with lines owned and established by the Government of the United States for public purposes.

That on the fourth day of October, 1886, after notice had been given to said Commonwealth of said filing and of other matters

mentioned in the notice hereto appended, as below stated, and a return made by said company under section 43 of chapter 13 of the Public Statutes of said Commonwealth, copies of which notice and return are hereto appended, the tax commissioner of said Commonwealth, in the manner required by its laws, estimated the fair cash valuation of all the shares constituting the capital stock of said corporation on said first day of May, 1886, at $50,600,000, and allowed as credits to said corporation out of said $50,600,000 the sum or value of $8,206,393.09, as follows:

For 209¾ shares held by the company unissued at $62.50	$13,109 37
For stocks in other companies outside of its system not included in above statement of miles of lines	8,193,483 72
	$8,206,593 09

And determined the whole number (or whole length) of the miles of line of said defendant to be 151,152.30 as aforesaid, and 148,341.23 miles thereof, which included said tables, to be beyond the limits of said Commonwealth.

That the rate determined under the fortieth section of said thirteenth chapter of said Public Statutes for the taxation of the corporate franchises therein mentioned was in and for the year 1886 $14.48 for each thousand dollars of valuation.

69 That said commissioner, being of opinion that the valuation of the corporate franchise of said defendant for taxation by said Commonwealth was to be ascertained by deducting from

said	$50,000,000 00
The said	8,206,593 09
Thus leaving	$42,393,407 00

And then taking as the total number of miles of said line or lines 151,152.30, and as the number thereof in said Commonwealth 2,811.07, and the defendant not claiming exemption from taxation of any of said property as such because of its being over or upon post roads declared such by law, or navigable streams or waters of the United States, considered that the valuation of the corporate franchise of said defendant subject to be taxed in said Commonwealth at said rate was $\frac{28}{151}\frac{11}{151}\frac{07}{30}$ths of said $42,393,407, or in all $788,416, and assessed tax thereon of $11,416.26 to said companies; that, in fact, 2,316.44 miles of said line within said Commonwealth, part of said 2,811.07 miles, were on, over, under, or across said post roads—that is to say, railroads or highways made by law such post roads—or such streams or waters.

That on and before and since the first day of May, 1887, it owned, controlled, and operated under lease or otherwise a line or lines of telegraph within said Commonwealth as part of a system of 152,243.80 miles of line extending throughout the United States, part of Canada, and to Cuba and to England by submarine ocean

cable, connecting with lines owned and established by the Government of the United States for public purposes.

That on the fourth day of October, 1887, after notice had been given to said Commonwealth of said filing and of other matters mentioned in the notice hereto appended, as below stated, and a return made by said company under section 42 of chapter 13 of the Public Statutes of said Commonwealth, copies of which notice and return are hereto appended, the tax commissioner of the Commonwealth, in the manner required by its laws, estimated the fair
70 cash valuation of all the shares constituting the capital stock of said corporation on said first day of May, 1887, at $60,800,000.00, and allowed as credits to said corporation out of said $60,800,000.00 the sum or value of $8,208,584, as follows:

For 209¾ shares held by the company unissued at $76.00	$15,941 00
For stocks in other companies outside of its system not included in above statement of miles of line	8,192,643 05
	$8,208,584 00

And determined the whole number (or whole length) of the miles of line of said defendant to be 152,243.80 as aforesaid, and 149,344.08 miles thereof, which included said cables, to be beyond the limits of said Commonwealth.

That the rate determined under the fortieth section of said thirteenth chapter of said Public Statutes for the taxation of the corporate franchises therein mentioned was in and for the year 1887 $15.06 for every one thousand dollars of valuation.

That said commissioner, being of opinion that the valuation of the corporate franchise of said defendant for taxation by said Commonwealth was to be ascertained by deducting from

said	$60,800,000
The said	8,208,584
Thus leaving	$52,591,416

And then taking as the total number of miles of said line or lines 152,243.80 and as the number thereof in said Commonwealth 2,899.72, and the defendant not claiming exemption from taxation of any of said property as such because of its being over or upon post roads declared such by law or navigable streams or waters of the United States, considered that the valuation of the corporate franchise of said defendant subject to be taxed in said Common-
71 wealth at said rate was $\frac{2899720}{152243800}$ths of said $52,291,416, or in all $1,001,685, and assessed a tax thereon of $15,085.38 to said company.

That, in fact, 2,258.55 miles of said line within said Commonwealth, part of said 2,899.72 miles, were on, over, under, or across said post roads—that is to say, railroads or highways made by law such post roads—or such streams or waters.

That on and before and since the first day of May, 1888, it owned,

controlled, and operated under lease or otherwise a line or lines of telegraph within said Commonwealth as part of a system of 168,433.35 miles of line extending throughout the United States, part of Canada, and to Cuba and England by submarine ocean cable, connecting with lines owned and established by the Government of the United States for public purposes.

That on the eighth day of October, 1888, after notice had been given to said Commonwealth of said filing and of other matters mentioned in the notice hereto appended, as below stated, and a return made by said company under section 42 of chapter 13 of the Public Statutes of said Commonwealth, copies of which notice and return are hereto appended, the tax commissioner of said Commonwealth, in the manner required by its laws, estimated the fair cash valuation of all the shares constituting the capital stock of said corporation on the said first day of May, 1888, at $67,343,750, and allowed as credits to said corporation of said $67,343,750 the sum or value of $10,947,692.64, as follows:

For 260.52 shares held by the company unissued at $78.12½	20,351	71
For stocks in other companies outside of its system not included in above statement of miles of line	10,927,340	93
	10,947,692	64

And determined the total number (or whole length) of the miles of line of said defendant to be 168,433.35 as aforesaid, and
72 165,409.89 miles thereof, which included said cables, to be beyond the limits of said Commonwealth.

That the rate determined under the fortieth section of said thirteenth chapter of said Public Statutes for the taxation of the corporate franchises therein mentioned was, in and for the year 1888, $14.68 for each $1,000 of valuation.

That said commissioner, being of opinion that the valuation of the corporate franchise of said defendant for taxation by said Commonwealth was to be ascertained by deducting from

said	$67,343,750	
The said	10,947,692	64
Thus leaving	$56,396,057	36

And then taking as the total number of miles of said line or lines 168,433.35, and as the number thereof in said Commonwealth 3,023.46, and the defendant not claiming exemption from taxation of any of said property as such because of its being over or upon post roads declared such by law or navigable streams or waters of the United States, considered that the valuation of the corporate franchise of said defendant subject to be taxed in said Commonwealth at said rate was $\frac{3023.46}{168433.35}$ of said $56,396,057.36, or in all $10,123.36, and assessed a tax thereon of $14,861.09 to said company.

That, in fact, 2,949.46 miles of said line within said Common-

wealth, part of said 3,023.46 miles, were on, over, under, or across said post roads—that is to say, railroads or highways made by law such post roads—or such streams or waters.

That before and during said years 1886, 1887, and 1888, and since said defendant has continually transmitted over said lines on said post roads, streams, or waters between the several Departments of the United States Government and their officers and agents, or as provided by section 221 of the Revised Statutes of the United States at rates fixed by the Postmaster General, as required by said act of Congress or title LXV of said section, telegraphic communi-
73 cations and messages for the Government of the United States, including those for the signal service relating to the weather, storms, etc., and also commercial and business messages for purposes of foreign and interstate commerce from and to, into, through, and over and between said State of Massachusetts and all the other States and Territories of the United States, the city of Washington, and the District of Columbia, and to and from foreign countries by ocean submarine cables, both for said Government and for many private individuals and corporations resident and located as well out of as in said States; that it is impossible for said company to determine what portion of any sum received by it was received for services performed in said State in the transmission through the same or any part thereof of messages or communications received or delivered out of it or not on lines over said post roads, streams, or waters, but that the largest part or approximately seventy per cent. of said sums was for messages received or delivered out of said State.

That said defendant, on first day of May, 1886, owned a large amount of real estate located and subject to local taxation out of said State of Massachusetts on which there was assessed and paid by it a large amount (over $48,000) of taxes, besides other taxes.

That the amount or value of said real estate was $3,044,282.34, as appears by detailed statement for 1886, which is omitted from the printed record but may be referred to by either party as though set out, and that $2,633,198.77 thereof represents the cost and value of real estate owned in fee by the defendant, subject to mortgage to the extent of $1,336,000, and all taxes thereon assessed to and paid by it, and that $14,183.12 thereof represents the cost and value of buildings owned absolutely by the defendant and built upon land the fee to which is in the Government of the United States, and that $191,518.77 thereof represents the cost of the building Nos. 16 and 18 Broad street, New York city, owned by the defendant and built by it upon ground the fee to which is in other persons,
74 and which is leased to the defendant for the term of twenty years from May 1, 1883, at a yearly rental of $32,000, and all real-property taxes, assessments, etc., which were or may be levied upon said entire property by the State of New York or any subordinate municipality, and I find that all of said real-property taxes and assessments upon said whole property which were assessed thereon in and during the years 1886, 1887, and 1888 were, in fact, paid by the defendant.

That $202,524.74 thereof represents the cost and value of the buildings situate at the corner of Fifth avenue and Twenty-third street, in said city of New York, owned by defendant and built upon ground the fee to which is in other persons, and which is leased o the defendant for the term of twenty-one years from March 1st, 1883, at a yearly rental of $25,000, and all real-property taxes, assessments, &c., which were or may be levied upon said entire property (building as well as grounds) as real estate by the State of New York or any subordinate municipality; and I find that all of said real-property taxes and assessments upon said whole property which were assessed thereon in and during the years 1886, 1887, and 1888 were, in fact, paid by the defendant.

That $2,856.94 thereof represents the cost and value of certain smaller buildings and structures situated in various portions of the United States owned by the defendant and built upon ground leased from other persons, as to which there is no proof regarding payment of taxes.

That on the 1st day of May, 1887, said defendant owned a large amount of real estate located and subject to local taxation outside of said State of Massachusetts, upon which there was assessed to and paid by it a large amount, to wit, over $48,000 of taxes, besides other taxes.

That the amount or value of said real estate was $3,045,428.26, as appears by the detailed statement for 1887, which is omitted from the printed record and may be referred to by either party as though set out and made part hereof, and that $2,634,344.69 thereof
75 represents the cost or value of real estate owned in fee by the defendant and subject to mortgage as aforesaid and all taxes thereon or assessed to and paid by it.

And that $14,183.12 thereof represents the cost and value of buildings owned by the defendant and built as aforesaid upon land owned by the Government of the United States.

And that $191,518.77 and $202,524.74 thereof represent as aforesaid the cost and value of the buildings 16 and 18 Broad street, at the corner of Fifth avenue and Twenty-third street, New York city.

And that $2,856.94 thereof represents the cost and value of certain smaller buildings and structures situated in various portions of the United States owned by defendant and built upon ground leased from other persons, as to which there is no proof regarding payment of taxes.

That on the 1st day of May, 1888, said defendant owned a large amount of real estate located and subject to local taxation outside said State of Massachusetts, upon which there was assessed to and paid by it a large amount, to wit, over $48,000 of taxes, besides other taxes.

That the amount of value of said real estate was $3,043,756.32, as appears by the detailed statement for 1888, which is omitted from the printed record, but which may be referred to by either party as though set out, and that $2,634,344.69 represents the cost or value

of real estate owned in fee by the defendant and subject to mortgage as aforesaid, and all taxes thereon or assessed to or paid by it.

And that $14,183.12 thereof represents the cost or value of buildings owned by the defendant as aforesaid and built upon land owned by the Government of the United States.

And that $191,518.77 and $202,524.74 thereof represents as aforesaid the cost and value of the buildings 16 and 18 Broad street and at the corner of Fifth avenue and Twenty-third street, New York city.

And that $1,185 thereof represents the cost and value of
76 certain smaller buildings and structures situated in various portions of the United States owned by the defendant and built upon ground leased from other persons, as to which there is no proof regarding payment of taxes.

And it was agreed by the said parties hereto that if it appeared and became material upon any final decision in this case to fix the amount or value of said real estate or taxes thereon or the amount received for any class of messages and was not agreed upon by them, the same should be determined on further hearing by the examiner.

That no deduction or allowance was made in assessing said tax or in ascertaining the valuation of said franchise for taxation, as aforesaid, on account of said real estate, land or buildings, or the taxes paid thereon, or for anything not above specifically stated.

That notices, of which the following are copies, were sent to said defendant and received by it about the time of their respective dates:

COMMONWEALTH OF MASSACHUSETTS:

TAX COMMISSIONER'S OFFICE,
STATE HOUSE, BOSTON, *October* 4, 1886.

Western Union Telegraph Company to the Commonwealth of Massachusetts, Dr.

To tax on $788,416 at the rate of $14.48 per thousand dollars ---------- $11,416 26

Due Nov. 3, 1886.

To R. H. Rochester, treasurer of Western Union Telegraph Company, New York:

77 You are hereby notified, in accordance with the provisions of chap. 13 of the Public Statutes, that the above amount of $11,416.26 will be due and payable to the treasurer of the Commonwealth by said corporation in thirty days from the date hereof.

You are further notified that within ten days from the date hereof said corporation may apply for a correction of said tax and be heard thereon before the board of appeal provided for in said chapter.

Respectfully yours, CHAS. ENDICOTT,
Dep. Tax Commissioner.

Checks should be payable to the order of the treasurer of the Commonwealth.

Office hours from 9 a. m. to 2 p. m.

COMMONWEALTH OF MASSACHUSETTS:

TREASURY DEPARTMENT, BOSTON, *Nov.* 18, 1886.

Western Union Telegraph Co., Roswell H. Rochester, treasurer.

DEAR SIR: A tax of $11,416.26 has been certified due from your corporation, payable November 3d, 1886, and notice given your corporation to that effect. Unless the same is paid forthwith the legal rate of interest (six per cent.) will be charged and collected from the date of November 3d. If collected by process in court the rate of interest by law is one per cent. a month.

Please give the matter your early attention.

Yours truly, ALANSON W. BEARD, *Treasurer*,
By H. S. BRIDGE.

78 COMMONWEALTH OF MASSACHUSETTS:

TREASURER'S OFFICE, BOSTON, *Dec.* 23, 1886.

To the treasurer of the Western Union Telegraph Co.

SIR: Your corporation tax for 1886, amounting to $11,416.26, remains unpaid.

Unless the amount, with interest at six per cent. per annum from the third day of November last past, is received before the second prox., I shall place the claim in the hands of the attorney general for collection.

Truly yours, A. W. BEARD,
Treasurer and Receiver General,
By H. S. BRIDGE.

COMMONWEALTH OF MASSACHUSETTS:

TAX COMMISSIONER'S OFFICE,
STATE HOUSE, BOSTON, *October* 4, 1887.

Western Union Telegraph Company to the Commonwealth of Massachusetts, Dr.

To tax on $1,001,685, at the rate of $15.06 per thousand dollars ---------- $15,085 38

Due Nov. 3, 1887.

To R. H. Rochester, treasurer of Western Union Telegraph Company, New York:

You are hereby notified, in accordance with the provisions of chap. 13 of the Public Statutes, that the above amount of
79 $15.085.38 will be due and payable to the treasurer of the Commonwealth by said corporation in thirty days from the date hereof.

You are further notified that within ten days from the date hereof said corporation may apply for a correction of said tax, and be heard thereon before the board of appeal provided for in said chapter.

Respectfully yours, CHAS. ENDICOTT,
Deputy Tax Commissioner.

Checks should be payable to the order of the treasurer of the Commonwealth.

Office hours from 9 a. m. to 2 p. m.

COMMONWEALTH OF MASSACHUSETTS:

TREASURY DEPARTMENT, BOSTON, *Oct.* 19, 1887.

Western Union Telegraph Co., —— ——, treasurer.

DEAR SIR: A tax of $15,085.38 has been certified due from your corporation, payable November 4, 1887, and notice given your corporation to that effect. If this tax be not paid when due, the legal rate of interest (six per cent.) will be charged and collected from the above-named date. If collected by process in court, the rate of interest, by law, is one per cent. a month.

Please give the matters your early attention.

Yours truly, ALANSON W. BEARD, *Treasurer*,
By L. P. BRIDGE.

80 COMMONWEALTH OF MASSACHUSETTS:

TREASURER'S OFFICE, BOSTON, *Dec.* 23, 1887.

To the treasurer of the Western Union Telegraph Co.

SIR: Your corporation tax for 1887, amounting to $15,085.38, remains unpaid.

Unless the amount, with interest at six per cent. per annum from the 4th day of November last past, is received before the 31 inst., I shall place the claim in the hands of the attorney general for collection.

Truly yours, A. W. BEARD,
Treasurer and Receiver General,
By L. P. BRIDGE.

COMMONWEALTH OF MASSACHUSETTS:

TAX COMMISSIONER'S OFFICE,
STATE HOUSE, BOSTON, *October* 8, 1888.

Western Union Telegraph Company to the Commonwealth of Massachusetts, Dr.

To tax on $1,012,336, at the rate of 14\frac{68}{100}$ per thousand dollars ---------- $14,861 09

Due Nov. 7, 1888.

To R. H. Rochester, treasurer Western Union Telegraph Company, New York:

You are hereby notified, in accordance with the provisions of

chapter 13 of the Public Statutes, that the above amount of $14,861.09 will be due and payable to the treasurer of the Commonwealth by said corporation in thirty days from the date hereof.

81 You are further notified that within ten days from the date hereof said corporation may apply for a correction of said tax, and be heard thereon before the board of appeal provided for in said chapter.

Respectfully yours, CHAS. ENDICOTT,
Deputy Tax Commissioner.

Checks should be payable to the order of the treasurer of the Commonwealth.

Office hours from 9 a. m. to 2 p. m.

COMMONWEALTH OF MASSACHUSETTS:

TREASURY DEPARTMENT, BOSTON, *Oct.* 19, 1888.

Western Union Telegraph Co., —— ——, treasurer.

DEAR SIR: A tax of $14,861.09 has been certified due from your corporation, payable November 4, 1888, and notice given your corporation to that effect. If this tax be not paid when due the legal rate of interest (six per cent.) will be charged and collected from the above-named date. If collected by process of court the rate of interest, by law, is one per cent. a month.

Please give the matter your early attention.

Yours truly, ALANSON W. BEARD, *Treasurer,*
By L. P. BRIDGE.

82 COMMONWEALTH OF MASSACHUSETTS:

TREASURER'S OFFICE, BOSTON, *Dec.* 23, 1888.

To the treasurer of the Western Union Telegraph Co.

SIR: Your corporation tax for 1888, amounting to $14,861.09, remains unpaid.

Unless the amount, with interest at six per cent. per annum from the 4th day of November last past, is received before the 31st inst., I shall place the same in the hands of the attorney general for collection.

Truly yours, A. W. BEARD,
Treasurer and Receiver General,
By L. P. BRIDGE.

That said defendant in each case protested against said assessment and tax and declined to pay the same, and sent communications and returns to the treasurer of the Commonwealth of Massachusetts, who duly received the same, copies whereof for the taxes of 1886 and 1887 are annexed to the several answers filed by defendant in said two cases and made part hereof the same as though set out at large. That for 1888 is omitted from the record by consent, but may be read from by either party as though set out.

I also report the following testimony, taken before myself and a special examiner in New York, agreed upon by the parties hereto, regarding the value of tangible property in Massachusetts and of the franchises granted to the defendant under and by the provisions of the act of Congress of July 24, 1866, aforesaid.

83 U. S. Circuit Court, District of Massachusetts.

ATTORNEY GENERAL OF MASSACHUSETTS, by Information, *vs.* WESTERN UNION TELEGRAPH COMPANY. } Three Cases (Taxes of 1886, 1887, and 1888).

DECEMBER 8, 1880.

PHILIP J. MCLAUGHLIN sworn, and testifies as follows:

I am employed in the superintendent's department as statistical clerk for the third and fourth districts of the eastern division, which division includes all of Maine and New Hampshire and of Vermont, except a small portion in the S. W. portion and all Massachusetts east of Connecticut river, all of Rhode Island, and all of Connecticut east of Connecticut river. I keep the semi-annual returns of length of lines and poles. The returns are made up from reports of foremen of construction and repairs. Witness produces samples of returns, from which samples it appears that in the year 1888 there were eleven thousand two hundred and eighty-six miles of wire in the State of Massachusetts east of Connecticut river, and in the year 1887 there were eleven thousand three hundred and seventy-one miles in said territory; in 1886 there were twenty-five hundred and five (2,505) miles of poles or lines, and for the year 1887 the same number of miles; that in said territory for both years there were one hundred and fifty-two of what is called double lines—that is, a single route over which there is a double line of poles. From these returns I find that the miles of lines in May, 1886, on rail-
84 roads was 1,740; miles of wire, 6,011; on public highways there were 697 miles of lines and 4,744 miles of wire; on private property, miles of lines, 67; miles of wire, 531.

In 1887 there were on railroads 1,740 miles of line and 6,096 miles of wire; on public highways, 697 miles of line and 4,744 miles of wire; on private property, 67 miles of line and 531 miles of wire; all of the above being in Massachusetts east of the Connecticut river. The cost of poles I got from the bare cost of them at $1 each; the average number of poles is 35 to a mile; cost of setting poles, 50 cents each; cost of cross-arms is ten cents each; of insulator glasses, 3 cents each; cost of pins, 1½ cents each; bolt and washer, 1¾ cents each. The cost of wire is $15 a mile; average weight of wire is 380 pounds a mile, at 4¼ cents a pound; cost of labor is $4 a mile for stringing the wire; total cost, $15 a mile for wire; $60 to $65 a mile for poles with one wire. My figures are obtained from the invoices sent from the supply department in New York. Payments are made in or from New York. Other supplies are paid

for in same way. Set of sound instruments at present cost, $9.65 a set; reporting instruments cost $56.95 each; duplex instruments cost $75 each; quadruplex instruments cost $147 each; repeater sets cost $40 each; district call-boxes cost $1 each; tickers, $50 each; W. U. printer instruments, $50 each; main and local battery, 40 cents a cell. The total value of all the property of the company in Massachusetts east of Connecticut river is shown.

Defendant offers Exhibits "C," State of Massachusetts, Mr. Roache's district, miles of line and inventory; "D," inventory and mileage in Humstone's district; "E," total mileage, Mr. Roche's district and Mr. Humstone's district; "F," recapitulation, total value, 1886, 1887.

Entire testimony objected to as incompetent.

(Exhibits C, D, E, F shown witness:) All of C, Mr. Roche's district in E, and F came from the paper I have described and which I recall.

Cross-examination by plaintiff:

85 As between Massachusetts and the States of Maine, Vermont, and New Hampshire, the proportion of miles of wire to miles of poles is greater in Massachusetts.

PHILIP J. McLAUGHLIN.

Subscribed and sworn to before me this 21st day of December, A. D. 1889.

FRANCIS S. FISKE,
U. S. Commissioner.

[SEAL.]

EXHIBIT C, F. S. F.

State of Massachusetts, 3d and 4th Districts, E. D. (Mr. Roche's District).

	May 1st, 1886.		May 1st, 1887.	
	Ms. poles.	Ms. wire.	Ms. poles.	Ms. wire.
Total miles owned, leased, and controlled	2,505.02	11,286.94	2,505.02	11,371.94
Deduct miles of line on private property	67.50	531	67.50	531
Miles of line on r'r'ds and highways	2,437.52	10,755.94	2,437.52	10,840.94
Divided as follows:				
Miles on railroads	1,740.18	6,011.51	1,740.18	6,096.51
" " highways	697.34	4,744.43	697.34	4,744.43
Totals	2,437.52	10,755.94	2,437.52	10,840.94

86 Inventory—articles.	May 1st, 1886.		May 1st, 1887.	
	Number.	Est. cost.	Number.	Est. cost.
Cells of main battery	13,830	$5,532 00	13,915	$5,566 00
" local "	2,387	1,154 80	2,418	967 20
Sets of sound instruments	762	7,353 30	799	7,710 35
Sets of recording instruments	162	9,225 90	160	9,112 00
Sets of duplex instruments	11	825 00	13	975 00
Sets of quadruplex instruments	37	5,439 00	40	5,880 00
Sets of repeater instruments	17	680 00	20	800 00
District call-boxes	337	337 00	389	389 00
Stock ticker instruments	231	11,550 00	283	14,150 00
Printing instruments	2	100 00	2	100 00
Counters	45	4,000 00	45	4,000 00
Desks	23		23	
Chairs	236		246	
Closets, safes, railing, etc				
		$46,197 00		$49,649 55

Exhibit D, F. S. F.

Inventory.

Mr. Humstone's district, 1886 and 1887, with addendum for 1888.

Inventory or Recapitulation.

Keys, 94, at $0.75	$70 50	
For 1888, keys, 105, at $0.75	------	$78 75
Relays, 86, at $2.85	245 10	
For 1888, relays, at $2.85	------	250 80
Sounders, 50, at $1.15	57 50	
For 1888, sounders, 52, at $1.15	------	59 80
Registers, 17, at $25.00	425 00	
For 1888, registers, 18, at $25.00	------	450 00
Box relays, 10, at $5.00	50 00	
For 1888, box relays, 12, at $5.00	------	60 00
87 Cells of battery, 76, at $0.41	31 16	
For 1888, cells of battery, 74, at $0.41	------	29 52
Switchboards, 12–1 wire, at $0.70	8 40	
For 1888, switchboards, 13–1 wire, at $0.70	------	9 10
Switchboards, 15–2 wire, at $2.00	30 00	
For 1888, switchboards, 14–2 wire, at $2.00	------	28 00
Switchboards, 4–3 wire, at $3.15	12 60	
For 1888, switchboards, 5–3 wire, at $3.15	------	13 75
Switchboards, 3–4 wire, at $4.15	12 45	
For 1888, switchboards, 3–4 wire, at $4.15	------	12 45
Switchboards, 1–6 wire, at	7 40	
For 1888, switchboards, 1–6 wire, at	------	7 40
Switchboards, 1–9 wire, at	12 92	

For 1888, switchboards, 1–9 wire, at		12 92
Switchboards, 1–12 wire, at	21 50	
For 1888, sideboards, 1–12 wire, at		21 50
Switchboard, 1–15 wire, at	32 25	
For 1888, switchboards, 1–15 wire, at		32 25
Switchboards, 2 table switches, at $0.46	92	
For 1888, 2 table switches, at $0.46		92
Cut-off, 5		
L'nt'g arrester, 30	19 50	
	$1,037 20	
For 1888, l'nt'g arrester, 29		18 85
Total for 1888		$1,084 01

Mileage in Mr. Humstone's District.

MAY 1ST, 1886.

On railroads	267.25 poles,	897.60 wires.
On highways	110.70 "	290.76 "

MAY 1ST, 1887 (and May 1st, 1888).

On railroads	267.25 poles,	897.60 wires.
On highways	110.70 "	290.76 "
	2,882.97	12,560.30

88 EXHIBIT E, F. S. F.

Total Mileage.

	May 1st, 1886.		May 1st, 1887.	
	Ms. poles.	Ms. wires.	Ms. poles.	Ms. wires.
Mr. Roche's district:				
On railroads	1,740.18	6,011.51	1,740.18	6,096.51
" highways	697.34	4,744.43	697.34	4,744.43
" private property	67.50	531	67.50	531
	2,505.02	11,286.94	2,505.02	11,371.94
Mr. Humstone's district:				
On railroads	267 25	897.60	267.25	897.60
" highways	110.70	290.76	110.70	290.76
Totals	2,882.97	12,475.30	2,882.97	12,560.30

EXHIBIT F, F. S. F.

1886.

2,882.97 miles of poles, @ $65	$187,393 05
12,475.30 " " wire, " 15	187,129 50
Personal property:	
Mr. Roche's district	46,197 00
" Humstone's district	1,037 20
Total value of property	$421,756 75

1887.

2,882.97 miles of poles, @ $65	$187,393 05
12,560.30 " " wire, " 15	188,404 50
Personal property:	
Mr. Roche's district	49,649 55
Mr. Humstone's district	1,037 20
Total value of property	$426,484 30

89 *Statement for* 1888. *Mr. Roche's District.*

State of Massachusetts, 3d and 4th districts, E. D.

	May 1st, 1888.	
	Ms. poles.	Ms. wires.
Total miles owned, leased, and controlled	2,645.51	13,235.89
Deduct miles of line on private property	74	790.75
Miles of line on r'r'ds and highways	2,571.51	12,445.14
Divided as follows:		
Miles on railroads	1,874.17	7,700.71
" highways	697.34	4,744.43
Totals	2,571.51	12,445.14

Inventory—articles.	May 1st, 1888.	
	Number.	Est. cost.
Cells of main battery	14,397	$5,758 80
" " local "	2,463	985 20
Sets of sound instruments	851	8,212 15
" " recording "	156	8,883 20
" " duplex "	13	975 00
" " quadruplex "	48	7,056 00
" " repeater "	20	800 00
District call-boxes	419	419 00
Stock-ticker instruments	285	14,250 00
W. U. printer " "Phelps"	2	100 00
Counters	45	
Desks	23	4,000 00
Chairs	250	
Closets, safes, railings, &c.		

The above statements of Superintendents Humstone and Roche for the year 1888 are not included in the foregoing affidavit of P. J. McLaughlin, but are admitted to be true without proof, and it is admitted that the property above described comprises all the tangible property of said defendant in said State of Massachusetts in said years respectively.

90 U. S. Circuit Court, District of Massachusetts.

ATTORNEY GENERAL OF MASSACHUSETTS, by Information, *vs.* WESTERN UNION TELEGRAPH COMPANY. } Three Cases (Taxes of 1886, 1887, and 1888).

Examination of witnesses on behalf of defendant, held at the defendant's office, in the city of New York, Assistant Attorney General Henry C. Bliss appearing for the plaintiff and Dillon & Swayne, by C. W. Artz, for defendant.

Examination as held before me, William J. Harding, special examiner.

NORVIN GREEN, called as a witness on behalf of defendants, sworn.

By Mr. ARTZ:

Q. Will you please state, concisely and briefly as you can, your experience in the business of the management of telegraph companies from the time you first entered it to the present?

A. I entered upon the business of the management of telegraph companies in July of 1854, in the lessees of the New Orleans & Ohio telegraph lines at Louisville, Ky., which was soon after incorporated as the New Orleans & Ohio Telegraph Lessees, and a year or two later by amended legislation the corporate title was changed to the Southwestern Telegraph Company. I continued in that company as president until January of 1866, when the
91 company was absorbed by the American Telegraph Company, and I was made vice-president of the latter company. About the first of July of the same year the American Company was absorbed by the Western Union Company, and I was made vice-president of this company, and have continued in this company in active executive duties, except for about three years that I was president of a railroad company in Kentucky, to the present time. I have been president of the Western Union Company since April of 1878.

Q. You were an officer, then, namely, the vice-president of the Western Union Company, at the time of the passage of the act of '66?

A. I was.

Q. And are familiar with that act?

A. I am.

Q. Please state the condition of business while those companies which you have mentioned and the telegraph companies generally with which you had anything to do were merely limited to State charters during this period and the effect on the business of their extension and the act of '66 allowing them so to extend on post roads.

A. The situation was that in most of the States the telegraph company had no charter. Previous to the consolidations of 1866 the country was covered by numerous telegraph companies, and the messages were relayed and rebooked and renumbered at each transfer from one company to another. After they had been substantially absorbed into one company, that company found itself occupying most of the States with telegraph lines by courtesy, having no legal authority from the State to be there; also crossing navigable streams which separated States, one end of the cable or of a line on masts being in one State and the other end in another without any authority of law, so that there was no protection to such overhead lines or such cables should a steamboat wilfully drag them up. We had no remedy, as we had no legal right to be there. The act of Congress of 1866 gave us a franchise, the right to maintain and operate telegraph lines in all the States and under and over all navi-
92 gable streams, so that we are there by authority of law and not by courtesy——

Counsel for the Commonwealth objects to statement of witness defining the limitation of law as evidence.

The act of '66 gave us the right of way on Government lands and under and over navigable streams, but the franchise did not extend to the right to take private property or to appropriate it on post

roads or elsewhere without acquiring the privilege of doing so from the owners of the property. The franchise, however, secured the extension of our lines as one company through all the States and Territories of the Union.

Q. How did this consolidation under one management affect the growth of the business of the several lines, and was it beneficial to the growth of their business or not?

A. The business did grow immensely and doubtless largely by reason of the greater facilities afforded and better service rendered by being under one management and in the hands of one company.

Q. Did this consolidation bring into effect longer circuits so as to diminish the cost of transmission and enable better service to be given in that way?

A. It did. Perhaps there I ought to explain that the length of a circuit was and still is about five hundred miles, and there were circuits of that length, or nearly so, within the State, but it brought into use the compound circuit by the automatic repeater, by which writing direct at very much longer distances became practicable.

Q. What, in your opinion, is the effect of the rights and privileges of extending continuous lines over different States without being subject to State exclusion upon the burden of the company, its rates and its power of earning dividends and doing business generally?

Objected to as irrelevant and incompetent.

93 A. The effect I have substantially already described. The effect growing out of the unification of management, bringing the business at all lengths under one control, prevents the necessity of rewriting and rebooking.

Q. What effect did it have upon the rates of the company?

A. It enabled a great reduction in rates very soon afterwards and enabled the company to do its work at less cost. The first year after its consolidation, or, rather, the second year—the year ending July, '68—when the business was carefully kept the average cost to the company of handling its messages was $63\frac{4}{10}$ cents per message, and the average charge to the public $\$1.04\frac{7}{10}$ per message. The cost by reason of increased business has been reduced steadily almost every year. Sometimes for two or three years it remained about the same, until now the average cost of handling messages is $22\frac{4}{10}$ cents per message and the average rates collected $31\frac{2}{10}$ cents per message.

Q. How has this affected the burden imposed by taxation in local jurisdictions upon the company?

A. The effect has been to protect the company from improper burdens in the form of taxation on interstate commerce. Several decisions of the Supreme Court have annulled certain forms of State taxes levied against the company on the ground, as I understand it, that they were burdens on interstate commerce.

Q. Do you recall any instances in which the right of telegraph

companies to do business in any of the States without interference upon the part of the State has been contested?

A. The first instance was that of the Pensacola Telegraph Company, which had from the State an exclusive charter to do telegraph business in two counties in Florida. They were charging a dollar a message from Pensacola to Pollard, which is on the State line of Alabama, and that was the extent of their exclusive right. The Western Union Company was charging 75 cents from Pollard to New York, a distance of 1,700 miles. The Western Union Company de-
94 cided to build into Pensacola, but they were enjoined from doing any business and the State courts sustained the rights of the Pensacola Telegraph Company. The Supreme Court reversed their decision and held that we had the right under the act of '66 to do business there, and the rate was made a dollar from New York to Pensacola, and subsequently 75 cents.

Several other instances of taxation have been decided against the State by the Supreme Court, which will show for themselves better than I can state them, the effect of all of which has been to enable the company to steadily reduce its rate. The probability is that some States might either tax us out of existence or compel us to increase our rates for service.

Q. Has the standing of the company, as a going concern, been improved to any great extent by this legislation and the decisions of which you have spoken?

Objected to as incompetent.

A. The effect of the legislation and of the decisions has been to give the company greater security and improve the confidence in its permanent value, and, consequently, to improve the market values of its securities.

Q. What, in your opinion, are the elements which enter into and effect the market value of the company's stock?

Objected to—same objection.

A. The value of the company's property, its earning power, and the security of its continued existence and prosperity, with the value of its franchises and contracts for the occupancy of railroads for long terms.

Q. Do you mean to include the franchise derived from the Government of occupying post roads in that category?

Objected to—same objection.

A. Yes.

95 Q. From your experience in telegraph business, is it your opinion that if these long continuous lines were in any State under the sole control, subject to exclusion therefrom, of State Legislature the profits of the company would be affected?

Objected to—same objection.

A. I do not think the profits would be affected until exclusion had taken place; but the fact that such exclusion might take place

would affect the security of the company as to the future, and thereby affect the value of its securities.

Q. Can lines situated within one State alone be operated at a profit now?

Objected to—same objection.

A. I think that is a difficult question, whether the lines could be operated at a profit. I doubt if they could in any State be operated at a profit if confined to business within the State. The profits might be greatly reduced if limited to business within the State and compelled to give the business to other companies across the State lines.

Q. Is the actual or market value of stock, in your opinion, dependent upon the value as property of what may be called its tangible property, such as poles, wires, instruments, real estate, investments in stocks, and the like?

Objected to—same objection.

A. That is a very essential element of the value of its stocks, but a very large additional element is the value of its franchises and its contracts. I think that franchises, contracts, and everything else is property, but I distinguish them as material property. I think that the advantages the company enjoys by its franchises, railroad contracts, and patents quite as valuable as the cost value of its material property.

Q. What was the value of this tangible property in
96 Massachusetts in 1888, at the time the return was made by the company?

A. The value of the material property in Massachusetts, as made by our experts for that year, was $464,466. I did not make that valuation, but, like most things that I have to do with, it comes to me officially from experts in the employ of the company, the same way that the length of lines and mileage of poles and wires in cables in this suit comes to me. They come to me through the proper officers of the company, and I believe them on that account.

Q. What, in your opinion, would this tangible property in Massachusetts bring at the best private sale to a corporation organized under the laws of the State of Massachusetts and limited to franchises which that State could give?

Objected to—same objection.

A. There is no reason in my mind why it should sell for more than its cost value, except with the entire value it might have with it carried by our contract for the exclusive occupancy of certain railroads. That might give it an additional value; it probably would, but, as answered before, I doubt whether there would be any profit if it was confined to business within the State of Massachusetts.

Q. In regard to the interstate business in messages originating or passing through Massachusetts, in a recent case between these parties in reference to the tax of '85 it is stated that the commissioner reports as follows:

"That it is impossible for said company to determine what portion of any sums received by it was received for services performed in said State in the transmission through the same or any part thereof of messages or communications received or delivered out of it or not on lines over said post roads, streams, or waters, but that the largest part or approximately seventy per cent. of said
97 sums was for messages received or delivered out of said State."

Please state, as near as you can, from your acquaintance with the business of the company, how nearly this applies in general to the following years, '86, '87, '88.

A. If you mean the business originating and terminating within the State, I think thirty per cent. of the whole is a fair estimate of that class of business.

Q. Can you class the interstate or foreign business which passes over or through the State of Massachusetts and how much, comparatively, these are?

A. I think the foreign business originating and terminating beyond the borders of the State is not nearly so large a class as the business originating or terminating within the State and from or to points without the State.

Q. Is it possible, in your judgment, to separate the portion of the market value of the stock assignable to its tangible property and to its franchise any more than you have already done by your description above?

A. No; I think it cannot be definitely ascertained and might differ in the minds of different people.

Cross-examination by Mr. BLISS:

X Q. Originally the Western Union Telegraph Company, prior to any of its consolidations, had what territorial limits?

A. The Western Union Telegraph Company originally extended from Buffalo to Chicago, by way of Cleveland, Toledo, and Detroit, and to Louisville, Ky., by way of Columbus, Cincinnati, and Lexington, Ky. Prior to the consolidation of 1866 it had absorbed the New York, Albany and Buffalo Telegraph Company, extending from New York to Buffalo, and had absorbed the Atlantic and Ohio Telegraph Company, extending from Philadelphia to Pittsburgh, and also absorbed what was known as the P., C. & L. Company—Pittsburgh, Cincinnati and Louisville—from Pittsburgh via
98 Cincinnati to Louisville. In February of 1866 it absorbed the United States Telegraph Company, extending eastward from New York to Boston and Portland and westward to St. Louis, Chicago, and Omaha. It had also previously absorbed the Ohio and Mississippi Telegraph Company, from Cincinnati and Louisville by way of Indianapolis.

X Q. By what consolidation did it extend its lines into the other Southern States?

A. A few years previous to 1866 the American Telegraph Company had absorbed the New England Union Telegraph Company,

from New York to Boston and Portland; the Magnetic Telegraph Company, from New York to Washington by way of Philadelphia, Wilmington, and Baltimore, and the Washington and New Orleans Telegraph Company, from Washington to New Orleans by way of Richmond, Norfolk, Charleston, Savannah, Augusta, Macon, Montgomery, and Mobile, and the American Telegraph Company on the 1st of January, '66, absorbed the Southwestern Telegraph Company, having lines from Cincinnati to New Orleans and Mobile and Galveston and other points in Texas and to Little Rock, Pine Bluff, and Fort Smith, in Arkansas. All these went into the Western Union Company by its absorption of the American Telegraph Company July 1, 1866.

X Q. By what absorption did it extend its lines or connections to the Pacific coast?

A. That was also done previous to 1866 by the absorption of the Pacific Telegraph Company and the Overland Telegraph Company, of the Salt Lake and of the California State Telegraph Company, having lines throughout California and extending eastward to Salt Lake. I have omitted to state that with the absorption of the American Telegraph Company the Western Union also came into control by a long lease and the ownership of a majority of the stock of the Nova Scotia Telegraph Company, having lines throughout the maritime provinces of Canada.

X Q. Then I understand that by these absorptions and combinations you have been able to extend your service into and
99 through these several sections of the country until your system now practically covers the whole of the United States?

A. Yes, sir; I think we occupy with our lines every State and Territory of the Union and Nova Scotia and New Brunswick, in Canada.

X Q. The unification of these lines was accomplished by arrangements with the local companies and by acquiring stock in the local companies, I understand?

A. Yes, sir.

X Q. So that you came to have the enjoyment of the franchises, rights, and privileges of these several companies?

A. Yes, sir; those franchises, however, gave us chartered privileges in a number of States, but not in all the States, or even in a majority of them. In other words, we still find ourselves occupying a majority of States as foreign corporations by courtesy or comity that is generally extended from one State to another, but not obliged to extend.

X Q. Prior to 1866 the telegraph service extended over the whole country, did it not?

A. It extended from ocean to ocean and into most of the States, nearly all the States, if not all. I do not remember any State that did not have a telegraph line extending into and through it, but it did not extend to some of the Territories. There was no telegraph in New Mexico. I think none in Colorado and none in Washington.

X Q. But throughout the inhabited Territory the telegraph system extended, did it not?

A. Yes, sir; sparsely in most of them; not so ramified in its branches as it began to be soon afterwards.

X Q. I understand, then, that you acquired the net-work of wires that existed at the time of the consolidation with the franchises of the several companies, and that since then you have extended your service very greatly?

A. Yes, sir; we acquired such franchises as the companies had and have since extended them from 37,380 miles of line to 178,754 miles, and from 75,686 miles of wire to 647,697 miles.

100 X Q. I understand that the numbers of wires on a line in a sparsely settled region are much less than in the thickly settled portions of it?

A. Yes; the number of wires is greatly increased as we approach commercial centres, and as we extend to the sparsely settled countries a number of wires are not needed—in many cases only about two wires on a line.

X Q. And I understand the profits increased with the thickly settled portions of the country in distinction from places where population is sparse?

A. Yes, sir; the profits increase with the increased amount of business and the reduced cost of handling it. The cost of the service is partly made up of items of maintaining and operating the lines. Lines are more cheaply maintained in open countries and more cheaply maintained per mile of wire the more wires you got on poles, and they are more cheaply operated. Where you have to pay an operator's salary to send ten or twelve messages per day the cost is more than where you can make him do a fair day's work of about 200 messages per day; but against that is the fact that rates are lower. We do not charge so much in those thickly populated portions of the country where business is large.

X Q. I suppose you claim that the public convenience is subserved by this extension of your service into different parts of country?

A. Yes, sir; very largely subserved and by reason of the extensions being all under one management.

X Q. Is it not true that this extension of your service has been received with approval by the communities into which your lines have gone?

A. No doubt about it. The communities are always glad to have a telegraph line extended to them, and when they got them they are just as glad to have an opposition line there.

X Q. Except in the two counties in Florida, has any State or Territory attempted to exclude your company by legislation from extending its wires?

A. I think not.

101 X Q. Is it not true that a large part of your foreign cable business passes through the State of Massachusetts?

A. Yes, sir.

X Q. How many cable termini have you in the whole country?

A. Well, in the first place, all of our through cables land at Canso; I think it is in Dover Bay, near the dividing line of Nova Scotia and Cape Breton. Then we have the French cables—those landed at Torbay—and then another at Duxbury. There are seven cables certainly in the pool; there were eight, but one has been trying to kick out, and there is litigation about it in Paris, and I could not say whether it is in or out or whether we have seven or eight cables in the pool yet. These are cables that the Western Union connect with. Four of these cables, belonging to the Anglo-American Company, do not come further south than Canso. The other four terminate at different points in the State of Massachusetts, and one or two of them have an intermediate landing at Torbay. I think two of them land at Duxbury.

X Q. Under the contract made with the United States, as you say, under the act of 1866, I notice that the Postmaster — claims a right to fix the tariff on rates to be paid by the Government for the transmission of messages. Is that right exercised by the Postmaster General at the present time?

A. The Postmaster General claims the right under that act that he shall fix the rate to be paid on messages between the Departments of the Government and any officers or agents of these Departments. We claim that that is not an unqualified power, but is limited by the constitutional provision that private property shall not be taken for public use without just compensation.

X Q. What proportion of the revenue of the company in years past has been derived from this Government business?

A. The gross revenues of last year were $20,783,000. The
102 whole amount paid by the Government was certainly less than $200,000. It is impossible to ascertain from our accounts the exact amount.

X Q. Under the terms prescribed by the present Postmaster General the revenue of the company will be materially lessened, will it not?

A. It would be reduced a little over one-half on that part of the revenue which is derived from the transmission of messages. Whilst the total revenue of the company was a little over twenty and three-quarter millions, that derived from the transmission of messages over the land lines was about $17,000,000. Considerably over a million was derived from the lease of private wires, and the remainder from the tolls on cable messages and dividends on stocks in other companies.

Redirect examination by Mr. ARTZ:

Re-X Q. When was the act of 1866 accepted by the company?

A. On the 5th day of June, 1867, by the board of directors. Filed and its receipt acknowledged by the Postmaster General on June 12, 1867.

Re-X Q. Please state whether there has been any attempt on the part of States to regulate rates for the transmission of messages.

A. There has been no attempt to regulate rates on messages pass-

ing without the State, but there has, I suppose, been twenty cases of bills in Legislatures to regulate rates. None have been enacted into laws except in Ohio and Florida. In Ohio we have conformed to the act, because it was not much out of the way. In Florida it was so much out of the way we have paid no attention to it, and they have never tried to enforce it.

Re-X Q. What attempts have been made by Legislatures of the different States to levy special taxation upon the company?

Objected to.

103 A. There have been taxes levied in almost every State.

NORVIN GREEN.

Subscribed and sworn to before me this 18th day of December, 1889.

WM. J. HARDING,
Notary Public, New York & Kings Counties,
State of New York, Special Examiner.

NEW YORK, *Nov. 29th*, 1889.

Parties met pursuant to adjournment.

Present: Mr. Henry C. Bliss, assistant attorney general of the Commonwealth of Massachusetts, for complainant; Mr. C. Walter Artz (of Dillon & Swayne), for defendant.

Mr. JOHN W. KIRK, being duly sworn, testified as follows:

Direct examination by Mr. ARTZ:

Q. Mr. Kirk, can you tell me briefly what connection you have had with telegraph companies and their management?

A. Well, as a starting point, I was with Morse at the time of his constructing the first line, under the grant of Congress, from Washington to Baltimore. It was to overlook the work more than anything else which identified me afterwards with telegraphy. My business then was a contractor with a large company out West for the carrying of mails. I was necessarily about Washington, and afterwards in the construction of telegraph lines as they came out West, my business being a mail contractor. It was
104 through me, in connection with this progress, that the building of the lines was more or less consolidated, and after I got through that business I was in a transportation company and a buyer of grain in Ohio, and the shipping of it brought me in connection with telegraphy and with the construction of lines to suit my convenience. I had no direct interest in those days other than my business connection that lines should be built. About the year 1864 I was solicited to take charge of what was then the United States Telegraph Company. It had grown considerably in the East and was going West. I was placed in charge of the construction and management of the lines west of Pittsburgh. They wanted to construct lines through all the States west of Pittsburgh and also to California. The difficulty in con-

structing lines was very great, owing to the difficulty of procuring right of way, finding it impossible to secure right of way. For instance, the State of Ohio, where I was located, we had to take out corporations in the State of Ohio whereby we got power to condemn the right of way as well upon fronts of lands and houses as upon railroads. It was attended with a good deal of difficulty to get a line constructed at all. We were then, as you will see, detached corporations, one in Indiana, one in Ohio, one here, without any special powers to work together, liable to the laws of each State. Somewhere about 1865 I condemned largely in Ohio of the railroads, built our lines and got them through to St. Louis, then connecting Pittsburgh with the eastern portions. While in United States extending its lines that company was consolidated with the Western Union.

Q. Do you remember when that was?

A. That was in 1865. Well, then, although not in the employ of the Western Union, I yet afterwards acted largely in their interest, was familiar by my intimacy with all the officers and my long connection with the telegraph men of what was going on in telegraphy, both as to its development and material working, as also in construction of lines. Some of these companies it was necessary that I should continue on building, and, of course, under local charters, aided somewhat (this was up in '67, '8, and '9) by the Government.

105

Answer objected to.

We found, of course, under the State laws certain rights, but having the State rights and any other authority that we might have caused us less trouble to secure the right of way and didn't require us to go through in many cases to the full authority under the law—that is, by commencing proceedings in court. Having the charter and, as I said before, knowing that the thing was extended nationally somewhat facilitated our getting right of way. I built some lines in Jersey, Pennsylvania, Maryland, and Delaware through to Washington city.

Q. I understand you to say, then, that this act of Congress of 1866 had a practical effect in assisting you in obtaining rights of way in certain cases?

A. Well, it did in this respect: Our agent would take the charter along and tell land-owners sometimes, "Here we are, and we are a corporation, and this is extended now so as to embrace the whole country rather than being local organizations."

Q. Do you recollect while you were with the United States—that is, during the period from 1864 to 1866—there were any measures taken by that company to obtain such legislation as afterwards resulted in the act of 1866?

A. My impression now is (of course, I cannot fix dates) that some action had been taken prior to the passage of the act. We formed an independent corporation to build from the Missouri river to the Pacific coast. Although I was in charge of only a small part of the line, I incidentally knew about its plan to build. There was U.

S. legislation whereby they were authorized to construct from the Missouri river to the Pacific coast. I don't know what the legislation was, but I know there was something. I think you will find it somewhere.

106 Q. What I meant to say was not exactly that, but whether to your knowledge the United States Company ever tried to get such privileges as were subsequently granted by the act of 1866?

A. I don't recollect distinctly anything about it. It was at our meetings I heard the thing discussed. It was not then my business exactly, and I didn't have anything to do with it.

Q. Well, you were actively engaged in the purchase of lines for the Western Union and other telegraph work until how recent?

A. Up till three or four years ago.

Q. Did the privilege of going without State interference from one State to another throughout the United States improve the service which was given by the companies in which you were interested?

Objected to.

A. I have no doubt that the recognition of Congress was the means whereby we could increase our service to the advantage of the community by the prestige of that fact of the recognition, and aided us in making connections and combinations with other corporations to carry out our business successfully.

Q. What was the effect of the act upon the standing of the company—upon its reputation?

A. I think it was of very great advantage to it.

Q. How long have you lived in New York, Mr. Kirk?

A. Well, twenty years.

Q. Have you been interested in stocks during that time?

A. Well, yes; considerably until the last few years; not large dealing in them.

Q. How about telegraph stocks, have you dealt in them?

A. I dealt in them pretty largely for my means a number of years—from the consolidation of the United States and the Western Union about '66—for probably over 10 or 15 years. I bought and sold; bought on the market and speculated in considerable amounts.

107 Q. Do you think that this improvement in the standing of Western Union that you have stated influenced the value of its stock?

Question objected to on the ground that the witness is not competent to testify as an expert in the matter inquired of him.

A. It gave it a more general market value—a more inclination to invest in it—being, as it were, made more national than it was under the State organization alone.

Cross-examination *de bene* by Mr. BLISS:

Q. In the States where you had to do with the extending of telegraph lines there were local corporations, were there not?

A. Yes, sir.

Q. And these local corporations had been to a considerable extent extending their lines in various directions, have they not?

A. Yes, sir.

Q. And your consolidations with these local companies gave to the Western Union Company the rights and franchises which these local authorities enjoyed, did they not?

A. Yes, sir.

Q. And you simply took up the work and extended the service—covering more country?

A. Yes, sir.

Q. Now, is it a fact that in these several States there were statutes which authorized telegraph companies to extend their lines over the highways of a State?

A. I don't know about all of them; some had not.

Q. The effect of the consolidation of these several companies was to enable you to improve the telegraph service, was it not?

A. Yes.

Q. That is, by extending the service and by co-operation to be able to render more prompt and efficient service?

A. Yes.

108 Q. This was to the convenience of the community, was it not?

A. So I supposed; yes.

Q. And were you not encouraged in your efforts to extend the service through these different sections of the country?

A. Not necessarily.

Q. The communities generally called for the service to be extended among them, did they not?

A. They did at points, but the intermediate places where we had to take the right of way they objected, because they could not get any advantage from it.

Q. Notwithstanding the service had been extended through these communities, had it not, prior to 1866?

A. In some places it had not. We were not building duplicates; we were building extensions.

Q. Can you give an instance where prior to 1866 the extension of the telegraph service in any of the States referred to had been obstructed by local opposition?

A. In the State of Ohio we found it, as it were, impossible to build our lines in the direct course which the travel and trade required it should go (I speak of east and west). My agents reported to me the difficulties in getting through, and I had to go to the Legislature and get a law passed where I could condemn, there being no laws of Ohio for condemnation.

Q. What year was that?

A. I think it was in the fall of '64 or spring of '65. I was fought particularly by the railroads whose course ran east and west. I went to the Legislature, had the law passed, and had to condemn under the law the right to put up a telegraph line along the line of their roads. I succeeded in having that law passed and under that

law I succeeded in having it condemned as the only way of getting our lines through.

Q. What year was that?

A. I think that was in the spring of '65. It might have been the spring of '66. By the way, I think it was the winter of '65 and '6, and that is my impression now.

109 Q. Then I understand that under the protection or through the aid of State laws you had been able to extend your lines in various directions prior to summer of '66?

A. The point I would like to get at is whether or not our condemnations were in the spring of '66 or '65. I would not like to say previous to '66 without reference to anything to fix my memory whether it was '65 or '66. When I made these condemnations I could not do it without the aid of the law. I mean to say that only previous to that time that only by the aid of the State law that I could build a line.

Q. Is it quite true that the telegraph service prior to the summer of '66 had extended throughout the inhabited portions of the United States?

A. To a very considerable extent—the main points—the main lines.

Q. Then I understand, except in the Ohio case which you have referred to, you had no difficulty or no substantial difficulty in extending lines and the system prior to 1866?

A. I was not much connected with the construction prior to '66 myself. All I can say is that there was considerable difficulty in getting the lines through. This comes from hearsay—people that were not building the lines.

Q. Explain what you mean by difficulty in getting right of way.

A. The objection of the owners of the land—indisposition to grant the privilege of putting up the poles.

Q. The objection was, I believe, that the abutters claimed certain interests to the centre of the road in the fee of the land which was claimed to be infringed upon or appropriated by the company in the erection of their poles on the highways.

A. That was the objection.

Q. Do you know of any case where the State by legislation attempted to interfere with the extension of the lines?

A. No, sir.

110 Q. You don't understand, do you, that the act of '66 gives to the company a right to extend its line without first acquiring the right of way of individual owners or parties interested therein?

A. I don't so understand it.

Q. Then you understand that this act of '66 gives the company a right to extend its lines over all the post roads of the country without regard to the question of compensation to private parties who have an interest or property on said post roads?

A. Do you ask me if I understand that it does not give or does give?

Q. Do you understand that this act of '66 gives the telegraph com-

pany a right to extend its lines over all the post roads without regard to the rights of parties or abutters of compensation to them?

A. My recollection of the law is that it does not give them the power independent of the State authority to construct them—that is to say, by right of that they could go on and construct it over private property.

Q. Or, in other words, you understand that the company still is obliged to acquire its right as against private interests from State authority?

A. I don't think they had any right under that law to take the property without recompense.

Q. Then, if the only obstacle in the extension of the lines under the conditions prior to '66 was with reference to the right of way and the property interest therein and if those property interests still must be acquired under the State laws, do you conclude that the act of 1866 has added value to the stock of the Western Union Telegraph Company?

A. It was possible for us to build lines without evoking the aid of the law by the private grants of the owners of the lands or turnpike roads. Such owners were, moreover, to give us the right of way without contest at a small recompense because of the fact of a semi-official sanction of the Government. When the lines were erected they were under the sanction of the Government.

111 Q. In your experience in the construction of telegraph lines were you obliged to pay any considerable amount of money for rights of property along the lines that were interfered with?

A. The amount paid in sparsely settled countries, if at all, was small, but in the more densely populated portions of the country, such as New Jersey, Maryland, and Delaware, we had to purchase the right of way very frequently—not much in each individual case, but in the aggregate of forty poles to the mile it would amount to a considerable sum. The element of cost, however, was not so much the amount we paid for the poles as it was for the necessity of a good many times hiring the agents to see the parties and get their consent.

Q. You were obliged to get their consent after the act of 1866, nevertheless, were you not, the same as before?

A. Yes, to some extent; but the fact, as I said before in my testimony, of having the authority of the State and the knowledge of the Government's sanction of telegraph lines helped us in our negotiation to reduce the amount necessary to pay.

Q. Do I understand, then, that you have paid less for private interests interfered with subsequent to 1866 than before and prior thereto?

A. I don't know that I can make a comparison.

Q. In all these sections referred to you had authority under State laws, did you not, to extend your lines over the highways?

A. We had a State charter which authorized us under certain conditions to go on and get it, but I cannot recall them now.

Q. In the condemnation of private or corporate rights in the extension of telegraph lines along railroads, was it necessary to pay

any considerable amount of money to the railroad corporations for infractions of their rights?

A. No very considerable amounts that I recollect of.

112 Redirect by Mr. ARTZ:

Q. What effect did the act of 1866, if any, have in your negotiations with railroads for rights of way; did it facilitate you or not?

A. I don't recollect of any negotiations I had with the railroads after the passage of that act.

Q. To what extent was the act accepted by telegraph companies, that you know anything about?

A. All that I ever had anything to do with. It was a good many.

Q. About how many?

A. Well, we will say the Western Union, the Pacific and Atlantic (which was a large corporation), Southern and Atlantic, Continental Telegraph Company, and, I think, the Marine and Inland and the New Jersey and New England. I think that is all I recollect at this moment. My recollection is that they all accepted the grant—the act. I speak generally—my recollection about it. I have not examined the records.

Q. In what States of the Union have you built lines?

A. I had charge of them in Ohio, some in Indiana, and some in Kansas.

Q. In the Eastern States?

A. In the Eastern States I had something to do with the construction in New Jersey, Pennsylvania, Maryland, and Delaware and District of Columbia.

Q. When did you first come to New York?

A. Well, I was here a few months in '65, part of '66, part of '67, part of '69, and thereafter mostly here.

Q. Did you purchase telegraph stocks for yourself alone or did you act as broker?

A. I acted as broker part of the time; part of the time as speculator.

Q. Can you give me some idea as to how extensive your dealings were?

A. No; I cannot now. My own dealings were not very large, but to a considerable extent.

Q. Were you well acquainted with the executive officers of the telegraph companies existing?

113 A. I have been since '65.

JOHN W. KIRK.

Subscribed and sworn to before me this 17th day of December, 1889.

WM. J. HARDING,
Notary Public, New York and Kings Counties,
State of New York, Special Examiner.

E. R. CHAPMAN, being duly sworn, testified as follows:

Direct examination by Mr. ARTZ:

Q. Mr. Chapman, what connection have you had with the management of telegraph companies? Outline your experience in that line, if any.

A. I was, about 1880, in charge of the construction of the first line of telegraph built by the Mutual Union Telegraph Company and constructed the line from Boston, Massachusetts, to Hartford, Connecticut, by way of Providence. The following spring I went to Chicago in connection with the construction of that system and built all lines of that system west of Cleveland and Cincinnati. After the lines were constructed I was in charge of the western department as general superintendent until the Mutual Union system was leased to the Western Union Telegraph Company in 1883.

Q. Did you then go out of the telegraph business?

A. I then retired from the telegraph business.

Q. What position did you occupy during that period in the Mutual Union?

A. During the construction of those lines I was employed and interested in the firm of John G. Moore & Co., who were the contractors of the Mutual Union Telegraph Company for the
114 entire system. When the lines were turned over to the company by the contractors I then became the general superintendent of the Mutual Union Telegraph Company.

Q. Did you have personal charge of the construction?

A. Yes, sir.

Q. Since you retired from the telegraph business what occupation have you been in?

A. I have been a railroad contractor. I have been the general manager of a car trust, owning a large amount of railroad equipment, and a broker and member of the New York Stock Exchange.

Q. When did you go into the business of brokerage?

A. I became interested in the house of Moore & Schley about three and a half years ago.

Q. Since that time to the present you remained in that firm?

A. Yes, sir.

Q. While in the telegraph business did you know the act of Congress of 1866 regarding the occupation of post roads by telegraph companies?

A. I did.

Q. How did that act come under your notice? What did you have to do with it in your business?

Objected to as incompetent.

A. It was brought to my attention when we first embarked in the business of constructing telegraph lines and in obtaining rights of way upon public roads over which most of our lines were constructed. It was used in connection with nearly all negotiations with local authorities which under State laws had jurisdiction over public highways. It was referred to and used argumentatively as a right

we possessed without reference to such local authorities, but that as a matter of courtesy application was made to them for the right to construct our lines upon designated highways over which they had jurisdiction.

115 Q. Had it any effect upon your negotiations for obtaining right of way—that is, what effect did it have upon negotiations for obtaining right of way by condemnation proceedings and the like?

A. We were never obliged to resort to condemnation proceedings where we desired to construct our lines upon the public highway, as I now remember, but application was usually made formally to the local authorities over highways. This act was used with the individuals composing the local board or whatever it might be as a reason why we should be given the right from them.

Q. You say you did this as a matter of courtesy?

A. As a matter of courtesy and to save friction with the local authorities.

Q. Did you use this act of 1866 in argument yourself personally?

A. Often.

Q. What effect in these personal interviews which you had with State authorities did the argument that the company had rights under this act independent of State legislation have?

A. I think it was often of value to us in bringing about favorable action on the part of these local authorities.

Q. What effect, if any, did it have upon the standing of the company?

Objected to as irrelevant and incompetent and on the ground that the effect of the law upon the standing of the company was not a matter for expert testimony.

A. The effect upon the standing of the company was necessarily to put it in a much more independent position, so far as its rights of way are concerned, than it otherwise would have been.

Q. Have you had any experience in telegraph stocks since you have become a broker in New York?

A. Yes, sir.

Q. How extensively have you dealt?

A. I think for four years our house has probably handled more telegraph stock than any house in the street.

116 Q. Is the business of your house limited to telegraph stocks?

A. No, sir; all stocks dealt in on the stock exchange.

Q. Are you familiar with stock values on the street in those stocks dealt in by your house?

A. With its market value.

Q. Were you purchasing stock for permanent investors?

A. Yes, sir; speculative and purchasing for investment.

Q. Have you customers for whom you have purchased Western Union as investment?

A. We have.

Q. What elements do you think enter into and determine the market value of Western Union stock?

Objected to as incompetent testimony and not being matter for expert testimony herein.

A. 1st, its earnings; 2d, its franchises and plant; 3d, its established business and connections; 4th, its commanding position and non-liability of attack by competition.

Q. What franchises do you mean, generally?

A. Franchises derived from its charter and the charter of companies which it owns and controls—those arising by reason of its contracts with other corporations—and the rights it derives under the act of Congress of 1866, and probably others.

Q. During this period that you have been in the business as stock broker have you been actively engaged in the purchase of stocks all the while?

A. For the past two years I have been actively engaged in handling orders for the purchase and sale of stock—transmitting them to the floor of the stock exchange.

Q. Did the Mutual Union Company accept the provisions of the act of 1866?

A. I have always understood that they did. I had nothing to do personally with the acceptance.

117 Q. You proceeded in your negotiations for your right of way on that hypothesis?

A. I did.

Cross-examination *de bene* by Mr. BLISS:

Q. In the construction of your lines in the several States referred to did you not operate under certain State rights giving your company authority to extend their lines over the highways of the State?

A. In some States any rights we may have derived from State legislation was undoubtedly referred to argumentatively in negotiations with local authorities.

Q. Did you not understand that you had under State statutes authority to extend your line through these several States?

A. In most States, according to my recollection, authority to telegraph companies to construct lines upon public highways was under the wording of the statute construed to cover telegraph companies chartered in the particular State. There were some States, however, where from the wording of the statute there appeared to be no such limitation.

Q. Did you meet with any formal opposition from State authorities to the extension of your line through the localities referred to?

A. From local town and county authorities frequently. I do not remember any case where State authorities interfered with us.

Q. Explain more fully the form of opposition from local authorities.

A. When the citizens along the public highways upon which we proposed to construct a line found out our intentions there was usually a neighborhood caucus called and the town or county officers

having jurisdiction were at once appealed to on behalf of our opponents and urged to exercise their authority and prevent our constructing a line upon such highway, and we would frequently find members of the local board very decided in their opposition to our purpose in that direction.

118 Q. Into what States did you project your line in the work referred to in your testimony?

A. Massachusetts, Rhode Island, Connecticut, Ohio, Indiana, Illinois, Michigan, Wisconsin, Iowa, and Minnesota.

Q. In what State was the Mutual Union incorporated?

A. It was incorporated in the State of New York. In almost every State we were obliged, in instituting condemnation proceedings to take private property, to incorporate a local company in such State; but the company owning the property was the company incorporated in the State of New York.

Q. State whether or not you were obliged to pay any considerable amount for the right of way over these various courses and for injury to private rights.

A. In the aggregate it would amount to a considerable sum.

Q. State the character of expenditures of the company in connection with the extension of its lines over the highways.

A. We were obliged to frequently pay for trees cut down or injured, and where there was any special damage or inconvenience resulting from the construction of our lines we aimed to compensate the owner of the abutting land reasonably.

Q. I understand by virtue of your incorporation in the several States referred to you acquired rights under local statutes to extend your lines along the highways?

A. I do not think in any of the States the rights already had under the act of Congress and our incorporation in the State of New York were extended, so far as highways are concerned, by local authorities. The local incorporations were principally valuable and I think exclusively valuable in cases where it was necessary to condemn private property.

Q. Then I understand that this act of 1866 enhanced the value of the stock of your company by facilitating your negotiations for the purpose of extending your lines through the States?

A. It undoubtedly did.

119 Q. And in States where by local laws you had a right to extend your lines the value of the Federal franchise was simply this convenience in the construction of their system?

A. I am under the impression that in several litigations upon the subject of right of way the act of 1866 was of value to us, but my recollection is too indistinct to testify in regard to it.

Q. (*de bene*). What is the effect of the terms of the contract with the Federal Government under the act of 1866, whereby the Postmaster General has power to fix rates of tariff on the market value of the stock of said company?

A. It would affect the market value of stock favorably or unfavorably according to the effect which the ruling of the Postmaster

General may, from time to time, have on the earnings of the telegraph company.

Q. That is to say, if the Postmaster General should make unfavorable designations of tariff rates the value of the stock of the company would be correspondingly depreciated?

A. Yes; to the extent that it would affect the revenue unfavorably.

Redirect by Mr. ARTZ:

Q. From your professional knowledge both as to telegraphs and to stocks, what effect, as favorable or unfavorable, do you think that the act of 1866, as a whole, including the power which was reserved to the Postmaster General of fixing rates from time to time, would have upon the company and its standing, especially as to the Western Union Telegraph Company?

Objected to as not a proper subject for expert testimony.

A. I think it would be of considerable value to the telegraph company.

120 Recross by Mr. BLISS:

Q. The value to the telegraph companies must be the advantages which they derive beyond what are accorded by State authorities, is it not?

A. My recollection is that the act of 1866 gives to telegraph companies the right to cross navigable streams, but under the jurisdiction of the United States, which rights could not be acquired under any State law of which I have any knowledge.

Q. Then do I understand that the main advantage under the act of 1866 was in the right to fix the company's rights thereunder to extend their lines under or above navigable waters?

A. No; I do not think so. The statutes in some of the States do not give telegraph companies any well-defined rights upon highways, some of them authorizing lines to be constructed upon highways, with the consent of some local authority, and without such consent it would be impossible to construct a line upon a highway within the jurisdiction of such local authority, so that in all such States the act of Congress confers very valuable rights upon a telegraph company accepting its provisions other than the right to cross navigable streams.

Q. In States where by local statutes telegraph companies are authorized to extend their lines along highways, the rights acquired, if any, under the act of 1866 would be practically valueless, would they not, so far as tending to enhance the value of stock of the telegraph company?

A. Where that right conferred by a State was clear, absolute, and indefeasible and not subject to local authority, yes; but I do not know of any such State. I will say further, in view of the dissimilarity in the laws of the various States upon the subject of construction of telegraph lines and the liability of local authorities and courts

to be influenced by popular opposition to the occupation of highways by a telegraph line, the absolute right acquired under the act of Congress makes an investment in telegraph property more
121 valuable than it otherwise would be, and hence its stock commands a higher price in the market.

E. R. CHAPMAN.

Subscribed and sworn to before me this 18th day of December, 1889.

WM. J. HARDING,
Notary Public, New York and Kings Counties,
State of New York, Special Examiner.

No. 1 BROADWAY, NEW YORK, *December* 9, 1889.

Parties met pursuant to adjournment.

Present: The examiner; H. C. Bliss, Esq., assistant attorney general; C. Walter Artz, Esq., of Dillon & Swayne, for Western Union Telegraph Company.

A. B. CHANDLER, being duly examined as a witness on behalf of the complainant in the above-entitled matter, testified as follows:

By Mr. BLISS:

Q. You are president, Mr. Chandler, of the Postal Telegraph Cable Company, I believe?

A. Yes, sir.

Q. To what extent does your line or system extend over the country?

A. It extends from Boston, on the east, along the Atlantic seaboard as far south as Birmingham, Alabama, to Cincinnati, Chicago, Minneapolis, Sioux City, and Kansas City, on the west.

Q. This system has been constructed, I believe, within the last few years?

A. Since 1881.

Q. I notice that you say in a communication to the Post-
122 master General that "as a matter of fact this company (referring to your own) has never, so far as I know or believe, derived the slightest benefit by its acceptance of the law of 1866." I will ask you now whether this expresses the situation of the company under the law referred to.

A. That statement was in accordance with my view of the facts, and is still so, so far as this company is concerned. Of course, I only refer to this company.

Q. I understand that the "law of 1866," referred to, is the act of Congress under which telegraph companies are authorized to construct their lines along post roads and under which the United States has a right or claims the right to acquire the property of the telegraph companies at its option?

A. Yes, sir; that is the law.

Cross-examined by counsel for Western Union Telegraph Co.

By Mr. ARTZ:

Q. Mr. Chandler, how long have you been connected with the Postal Telegraph Company?

A. Five years yesterday.

Q. You were, then, connected with the company at the time it accepted this act of 1866?

A. Yes, sir. The present company, it is proper to state, is a reorganization of the properties which had been in existence for a considerable time before; the present company dates from the middle of February, 1886.

Q. Do you remember the act being so accepted by the company as presently organized?

A. Yes, sir. It was accepted by its predecessor as well.

Q. At the time of the acceptance of the act by the present company what was your position—that was April 6, 1886?

A. I was still acting as receiver of the predecessor company.

Q. You were not, then, in the employ of the company as reorganized?

A. No, sir.

123 Q. The company as reorganized, I understand, is possessed as well of cable as land lines?

A. No, sir; our possessions comprise land lines only, except river cables.

Q. Did you personally have anything to do with the action taken by either the Postal Company as it now exists or its predecessor, as a result of which the act of 1866 was formally accepted by either of those companies?

A. I did not.

Q. You don't know, then, why the act was accepted?

A. It is my opinion that it was accepted more as a matter of following precedents that had been established by many companies before, as involving prospective benefits that the company ought to avail itself of.

Q. What were those benefits understood to be?

A. The establishment of relations with the Government under conditions which would place the newer companies in the same position, so far as friendly relations with the Government were concerned, as the older companies.

Q. It was considered better to accept the act than not under those circumstances?

A. Yes, sir.

Q. Mr. Chandler, have you any experience with stocks; have you dealt on the stock market so as to be acquainted with it?

A. To a limited extent.

Q. In what companies had you been interested before coming into the Postal?

A. I was for many years with the Western Union Company and for about seven years with the Atlantic and Pacific Company before coming here.

Q. When did you first go into the telegraph business?
A. 1857.
Q. In what company then?
A. Western Union.
Q. What positions have you held in the Western Union?
A. I have been office manager and superintendent.
124 Q. District superintendent?
A. Yes, sir.
Q. What was your district?
A. Sixth district of the eastern division.
Q. Comprising about what area?
A. I was at the same time in charge of the general superintendent's office and the cable traffic. The sixth district comprised the lines and offices north from New York city north as far as Rutland, Vermont, the district Mr. Humstone has now, except that he has this city as well.
Q. Did you do much construction where you had to condemn rights of way while you were superintendent of this district?
A. None at all.
Q. Had you had experience in condemnation proceedings yourself?
A. To a limited extent.
Q. Can you tell me a little more fully?
A. My most recent experience in the matter of taking condemnation proceedings was in connection with the Norfolk and Western Railroad Company in Virginia, where I have undertaken to build a line along the line of that railroad company between Petersburgh and Norfolk, availing ourselves of the local law in Virginia and of our rights under the United States law. Up to this time the Western Union's counsel, and particularly those locally engaged in that State, have been successful, through various technicalities, in staving off my operations very successfully; but the end is not yet.
Q. In these condemnation proceedings isn't it a fact that you proceeded upon the theory that these rights were worth something—no matter how much, but still of some value—to your companies?
A. Under the United States law?
Q. Yes.
A. Yes, sir; we still think they are.
Q. How do you reconcile this with your statement on your direct examination that your company has derived no benefit from the law?
125 A. Because we have so far only sought to derive a benefit without reaching any.
Q. Do you think that the acceptance of the law and knowledge of acceptance on the part of telegraph people generally has improved the standing and reputation of your company?
A. I think it has had a tendency to put us in proper relations with the Government, in so far as placing us, I may say, alongside of other companies.
Q. You consider that relation to the Government, then, as a benefit to the company?

A. We hope to make it so.

Q. In your new construction in the postal company, as it now exists, have you met with any opposition in securing rights of way from local boards or individuals?

A. Yes; more or less.

Q. Have you ever used the act of 1866 argumentatively in trying to reach a settlement with them?

A. It has been done.

Q. Do you think it has assisted you in any case to any degree?

A. I can't say, so positively as I wish I might, that it has.

Q. What is your opinion, whether it has been of advantage or not to cite that act in argument?

A. I don't recall any case in which we have been able to accomplish our purpose of securing a right of way under the authority conferred upon us in that act.

Q. Your lines extend through navigable water between States and within States, do they not?

A. They do.

Q. And isn't the right for you to remain there under the act of advantage to the company, in your opinion?

A. It is, no doubt, but whether we remain there by virtue of our acceptance of the law of Congress is not so clear.

126 Q. You think you would be entitled to a right of protection there if the act did not exist just as you are now?

A. I think there are very likely some cases where it might become of considerable importance to us to have the protection that we might properly claim under that act, but I don't recall any such case having arisen.

Q. As I understand your testimony as given, you consider not that the act does not convey valuable rights, but that in the case of your company there has not arisen much opportunity for the exercise of those rights?

A. Up to this time we have not been able to avail of them.

Q. You believe in their efficacy, nevertheless?

A. We have an abiding faith in their ultimate efficacy.

Q. You have stated that the standing of the company was affected favorably by its acceptance of the act and the relations created with the Government thereby. What effect do you think that a repeal of that act would have, supposing that it could be repealed, upon the standing of the company?

A. I think it would be unfavorable.

Q. And you think the reputation of the company upon the street would be affected?

A. I think it would raise a doubt right away as to the relations between the Government and the telegraph and lead to the apprehension that there was likely to be a conflict which would be destructive of telegraph property.

Q. Do you think that if the act of 1866 was abrogated there would be any consequent effect upon the market value of the stock?

A. I am inclined to think it would excite alarm in the minds of investors immediately.

Q. As I understand you, most of your telegraph experience was had in the employ of the Western Union Company?

A. Yes; in years.

127 Q. Did you there have anything to do with construction of lines?

A. Only under the direction of the general officers.

Q. You knew that the Western Union had accepted the provision of the act?

A. Yes, sir.

Q. Do you think that the Western Union Company was benefited in anywise by its acceptance?

A. I knew about the time that the negotiations out of which the act came into existence that it was regarded as having a favorable effect upon the Western Union Company in settling its relations to the Government.

Q. You think that the fact of its doing business under that act or having accepted its provisions has been, then, of benefit to the company until your connection with it ceased?

A. I had no immediate occasion to observe any effect of the act, and I should say that an officer of the Western Union Telegraph Company at present is better able to answer that question than I.

Q. Your opinion as to the effect upon the standing of the company was to the effect that it was favorable, I believe?

A. In the particular I have mentioned.

Q. And if that act should be abrogated by Congress do you think it would affect unfavorably the market value of the Western Union stock?

A. I am inclined to think it would.

Redirect examination:

Q. And that apprehension would be predicated upon a fear that the Government was likely to establish postal telegraphs, and so on, would it not?

A. I presume that would be one basis of apprehension.

Q. And that would be the principal basis, would it not, so far as alarm is concerned?

A. I think such action on the part of the Government, if

128 it should be taken, would be regarded as indicating an unfriendly attitude on the part of the Government against the existing telegraph properties, and that such action could hardly fail to be damaging to the properties in public estimation.

Q. And this is the apprehension to which you refer in your previous answer, is it not?

A. Yes, sir.

Recross-examination:

Q. Mr. Chandler, do you not consider the right to extend lines in several States without being subject to State exclusive laws a valuable one to telegraph companies?

A. It ought to be so, and we hope yet to make it so.

Q. Don't you think it is so just now?

A. As a reserved right, I should much regret to part with the privileges which the law confers upon us.

Q. If your company had not accepted it at present do you think you would advise its acceptance?

A. I should, promptly.

Redirect examination:

Q. I will ask you to what extent your company has extended its system within the past two years.

A. I think we have built three thousand miles of pole line and perhaps seven or eight thousand miles of wire lines within the last eighteen months.

Q. And this has been partly over post roads and highways, has it not?

A. It has been largely.

A. B. CHANDLER.

Subscribed and sworn to before me this 24th day of December, 1889.

WM. J. HARDING,
Notary Public, New York and Kings Counties, State of New York, Special Examiner.

129 NEW YORK, *Dec.* 10, 1889.

Present: The examiner; Henry C. Bliss, Esq., assistant attorney general, for the Commonwealth; C. W. Artz, Esq., of Messrs. Dillon & Swayne, for the defendant.

STEPHEN V. WHITE, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. ARTZ:

Q. What is your business?

A. I am a banker and broker.

Q. How long have you been engaged in that business?

A. Twenty-five years next month.

Q. Have you during that period dealt in telegraph stocks?

A. Yes, sir.

Q. About how extensively?

A. Varying at various times. I have bought sometimes as much as $3,000,000 of it in a day, and sometimes I would not buy or sell $10,000 worth of it in sixty days, but I have been very actively engaged in it in speculations for myself and others principally.

Q. You have bought a great deal of it for investment, have you not?

A. Yes, sir. Well, a great deal of it for investment in a qualified sense. I have bought a good deal of it for investment for investors as a broker, and I have bought it when I thought it was cheap and again sold it when it was high for a profit. In that sense it was more for an investment than as a speculation.

Q. During the past ten years how have your dealings in Western Union compared with other houses in Wall street?

A. We have been large dealers. I could not tell you, but many millions of dollars per year for the past ten years.

130 Q. You are acquainted with the market value of the stock?

A. Yes, sir.

Q. And have been here from time to time?

A. Yes, sir.

Q. Have you ever heard of the act of Congress of 1866 and the franchises thereby granted to the Western Union Telegraph Company?

A. Yes, sir.

Q. What elements do you think enter the value of Western Union stock upon this market?

A. Two elements—the dividend-earning power and the prospective perpetuity of that dividend-earning power. If you want subdivisions which would come in that I could go on and give you my views in regard to them.

Q. I should like it just as definite and detailed as you can give it?

A. The possibility of a business large enough that with the plant established they can earn regular and paying dividends on the capital stock. That is the element that determines its value, and a judgment upon that can only come with time; but in a series of years there has been an opportunity to get the record of the stock, so to speak, and its earning capacity is its first element. As to the perpetuity of it, we look to the question of what competition is likely to succeed, and if competition should be attempted what advantages, if any, the Western Union Telegraph Company would have over a new competitor, and those are the elements which I think enter into the estimate of values in operating in the stock.

Q. Do you think that the privileges conferred by the act of 1866, the right of occupying post roads, etc., influence the value of the stock on the market?

A. They unquestionably do, and to a very considerable extent. I know of no means by which that amount could be measured in saying such a per cent. is attributable to that.

131 Q. In advising purchasers to invest in Western Union stock, do you consider this Government franchise, as accepted by the company, as an element in your decision?

A. It is, and it has been, and will be again.

Q. What effect do you think that it has upon the standing of the company, as a corporation, upon the street?

A. I have before stated that I think it unquestionably enhances the estimate of value as witnessed by the market price.

Q. Suppose this act of Congress were repealed, would that fact affect the value of the stock on the market?

Mr. BLISS: The question is objected to as irrelevant.

The answer is taken subject to objection.

A. I have no doubt that if that act was repealed it could very seriously lower the price. Probably more in the immediate present

from the scare than it would later on when more considered, but in that event I have no doubt but what the price would be permanently lowered as resulting from it.

Cross-examination *de bene* by Mr. BLISS:

Q. Will you state more at lengh what you understand to be the distinctive advantages accruing to the company from the act of 1866.

A. The principal advantage—the abiding advantage now—is the right of using the right of way along all post roads of the United States. At the time that this act was passed I think there was an additional advantage which is of less significence now, and that was the right of taking, I think, both timber and stone, as I remember; materials for the construction of the lines of the company.

Q. Then you understand that this act of 1866 gives to the company a right to extend its lines along all post roads without regard to local authority and the rights of abutters?

132 A. My understanding is that it confers upon it the right of way to construct the lines of the company along all post roads. It may not be necessarily free from the necessity of making payment for use, but it gives it the character of eminent domain to the extent of entitling the company to use those roads.

Q. Is your basis of valuation predicated upon an understanding or an assumption that the company has a right to condemn property and to condemn a right of way along and over post roads through the different States?

A. My understanding is that it has the right to construct over the post roads of the United States, and I have not looked at the question or followed it up as to whether the right of eminent domain attaches, but, my understanding being that it can build along them, the question of damages resulting would be one in the nature of things which would be capable of solution by a court of law.

Q. Then you understand, without the aid of State legislation, the Western Union Telegraph Company can extend its lines along post roads throughout the United States?

A. I have believed so and do suppose so from my knowledge of the act of 1866, of which I have not refreshed my recollection by looking at it at all in the immediate past.

Q. On that assumption you assume that the franchise is of great value to the Western Union Telegraph Company?

A. On that assumption or on that belief I estimate that the market price of the stock is steadied and improved by that view of the relation to the Government.

Q. That there may be no misunderstanding I will restate the question: Is it true that you base your estimate of valuation (referring to the value of the franchise) upon the assumption that the Western Union Telegraph Company, under its powers derived from the act of 1866, can, without the aid of State legislation, extend its lines through the post roads of the different States, and for

133 that purpose condemn private property where the same may be interfered with?

A. I answer yes to all the portion of your question down to where you inquire if it may condemn private property, and in respect to that I answer that, the right of the Government in the post roads being an easement on the fee of the private owners over which the road passes, I understand that the Western Union Telegraph Company can plant its poles where that easement has already attached and use it for the construction and operation of a telegraph line.

Q. And for this reason you assume that the so-called franchise under the act of 1866 is of great value to the telegraph company?

A. I think it is of value.

Q. What other element of valuation, if any, have you in mind in making your estimate?

A. The general proposition that the Government extended to the telegraph companies which should accept its provisions these rights or favors, coupled with the fact that the Western Union is in the field and has established its lines along important points. In my judgment that franchise is a very strong element in its favor as against another company which should now come as a competitor, second in point of time, to occupy the same ground.

Q. Assuming that the president of the Western Union Telegraph Company has said in a communication to the Postmaster General that the great privileges and benefits derived by this company from the act of 1866 "are purely imaginary," would you be influenced in your conclusions as to the value of the franchise under the act of 1866?

A. I do not think I should a particle, because I think I know more about the elements that go to make the market price than the president of the company does, or as much.

Q. Do you think you know better than the president of the company as to the practical substantial advantages which have been derived under the act of 1866?

134 A. Well, I do not know that I think I know more than he does, but I think I know as well as he does the elements which go to give value in the public estimation to the franchise—to the property, by virtues of its franchise.

Q. Does anything add to or enhance the value of the stock which does not add practical utility to the operations of the company?

A. Not ultimately; and yet the fact that the Western Union Telegraph Company is recognized in its operations by the Government gives it a dignity which unquestionably, in my mind, adds to its market price in the markets of the country.

Q. Then an advantage arises from the friendly attitude of the Government to this company?

A. An advantage arises from the attitude under the law of this Government to this company. Sometimes it is considered that the attitude of the Government is not particularly friendly in its administration of the dealings under that law.

Q. You have stated in your direct examination that the repeal of the act of 1866 would impair the value of the telegraph stocks.

I wish you would explain more fully the reasons for such impairment of the valuation.

A. I would explain it by quoting what, if it were not a court of law, I should call a "stale chestnut"—that there is nothing so timid as a million dollars until you get to a million and a half dollars or two million dollars. If the attack is made by the repeal of that law upon this property there would be a general apprehension of very serious result to follow such action, and that it would very rapidly decline I have no doubt. Ultimately the price would arrange itself according to the estimate which investors would place upon the property as to its earning capacity and continuing capacity under the changed conditions resulting from the repeal of the law. How far it would go or what the ultimate price would be I cannot tell.

Q. You say investors would apprehend results. Can you indicate what results?

135 A. One thing would be that it was a fear of an antagonistic attitude to be permanently assumed on the part of the Government, doubtless, independent of the fear also of the results to follow from no longer having the right to build over the post roads without State aid or State permission, as I suppose it resolves itself probably into that as the effect of the act of 1866. Whatever starts an excitement in the price of a stock that is being carried on margins, if there is any apparent possible depreciation to result, always precipitates a selling movement which will carry the stock much further, indeed, than it is entitled to go on the action had.

Q. When was your attention first called to this act of 1866?

A. Many years ago. I could not tell how long; 1867, I should say.

Q. Can you remember the occasion of your attention being called to it?

A. It was in connection with the discussions as to the value of Western Union, which was then very cheap in the market, and the probable advantages to result from this. I would say that having once been in the law I have always kept the run of not only important legislation on most topics, but the decisions of courts in regard to great questions; and my attention was drawn to it very much more concisely than perhaps the average operator from that cause.

Q. Is that all you have to say as to your attention being called to this act of 1866?

A. That is all I had to say in answer to your question, which inquired when my attention was first called to it. My attention has been called to it, and it has been in my mind from that time to this, whenever such a question was properly under consideration.

Q. I asked you what were the circumstances, and I will now also ask you what was the occasion, if I did not do so heretofore, of your attention being called to this act of 1866?

A. There was a time, and I think it was in 1867 or 1868,

136 when Western Union first came into considerable prominence as a speculative stock in Wall street, and I was in the busi-

ness, both as a speculator and as a stock broker. I investigated with reference to what the Western Union Telegraph Company had to say for itself as one of the elements under which I should make up my mind what to do for myself and what to advise my customers. That was the occasion, although I think I knew of the passage of the law at the time that it passed, as well as the acts of 1862 and 1864 at the times that they were being passed, wholly independent of any questions of speculation.

By Mr. ARTZ:

Q. If the act of Congress were repealed, supposing that could properly be done, do you think the permanent value of Western Union stock would be affected by it?

A. I should think it would.

By Mr. BLISS:

Q. Would not this effect be largely or almost entirely due to an apprehension on that part of the people that it indicated that the Government was likely to establish a postal telegraph or competing line?

A. I have already indicated by my answer that I thought the price would be most largely affected, because it would indicate hostility on the part of the Government. What form it would take I do not know.

Q. Do you mean by hostility to refer to the possible incident to which I have alluded?

A. By hostility I mean the possible incident to which you have alluded, or possibly other phases of disagreement on the part of the Government. I am not limiting it necessarily to the postal telegraph scheme alone.

By Mr. ARTZ:

Q. Do you understand that the company is protected from exclusive State legislation by the act of 1866?

A. I have not looked at the act of 1866 critically, certainly, in a year, but my general remembrance of it is that it gives the right over post roads to an extent which will prevent States from excluding the building along post roads in whatsoever State it may be.

137 Q. If that right were withdrawn, should you consider that an element affecting the value of the stock, and what effect would it have?

Mr. BLISS: The question is objected to.

The answer is taken subject to objection.

A. I should consider it a matter affecting the value and liable to affect the value, in view of the known anti-corporation sentiment which is so manifest in the Northwestern States of this country at the present time, and which manifests itself in such actions as they have been taking against railroads, and which I should expect them

to take in any way that would seem to hurt corporate property if the protection of the Government in that regard were removed.

S. V. WHITE.

Subscribed and sworn to before me this 23d day of December, 1889.

WM. J. HARDING,
Notary Public, New York and Kings Counties,
State of New York, Special Examiner.

WAGER SWAYNE, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. ARTZ:

Q. Will you outline your experience in connection with telegraph companies?

A. I was counsel for the American Union Telegraph Company from about 1878 until 1881, when I came to be of counsel for the Western Union Telegraph Company, and I have been such ever since.

Q. You have frequently had occasion to make use of the act of 1866 in the company's behalf?

A. Yes; I have.

138 Q. Can you name instances in which it has been used and their practical effect?

Mr. BLISS: The question is objected to as leading to a matter not a proper subject for expert evidence in the manner offered and as irrelevant and incompetent.

The answer is taken subject to objection.

A. I argued in the Supreme Court of the United States the case of The Western Union Telegraph Company against The State of Texas, reported in 105 U. S., at page 460. The complainant's rights under that case were claimed expressly and solely under the act above referred to.

Mr. BLISS: The answer is objected to, as the record is the best evidence of the issues involved in the case.

A. (continued). And the result secured in that case was not simply of large pecuniary value to the company, but was of additional and much greater value to it in the moral effect and the resultant standing which it gave to the company as a medium for the transaction of interstate business, adding, in my judgment, materially to the value of the company's business as represented by its stock. So also in the case of The Western Union Telegraph Company against The Mayor of the City of New York and others, reported in the 38th Federal Reporter, at page 552, I found the act of 1866 of the greatest practical value to the company, so much so that in my judgment but for that act its facilities for doing business in and through the city of New York were liable to be seriously impaired. The Legislature of New York originally passed a law appointing a board of

electrical control, through whose means a plan should be devised for putting the wires under ground and requiring the wires to go under ground in accordance with such plan. In a way which, unhappily, is not without precedent in New York, this was made
139 use of as a basis for the creation and organization of private interests, closely connected with persons in high authority, as I am informed and believe; and a company was organized to construct subways for the use of which companies using electric wires should pay rent; and the board of electrical control was pledged by contract to do all in their power to compel all companies using electric wires to put their wires in the conduits of the company having the contract above referred to. The Western Union Telegraph Company had previously expended large sums of money in attempts of its own to put its own wires under ground, and had had them repeatedly destroyed by steam heat and other agencies, and had the same experience with wires which it put in these subways or some of them when constructed. To avoid the dilemma presented to it by the demands of the board of electrical control, on the one hand, and the results of its experience, on the other, the Western Union Telegraph Company arranged with the elevated railway companies for permission to put its wires upon their structures. This method of removing the wires and poles from the open streets seemed, more than any other thing, to enrage the board of electrical control whenever it was attempted, apparently for the reason that it removed an opportunity for clamor over the continuance of the wires in the streets at the same time that it deprived the constructing company of a portion of the revenue which they were looking for. The board of electrical control accordingly issued sweeping and peremptory orders and were, as the company was informed and believed, concerting steps for the summary destruction of a large portion of the Western Union Company's lines in New York city. The company thereupon resorted to the courts of the United States. A full hearing was had upon an application for a preliminary injunction, which was granted so far as the elevated railroads were concerned, and granted exclusively upon the ground that the Western Union Telegraph Company was entitled to resort to that method of disposing of its wires upon an agreement with the railroad company and
140 derived its right to make such an agreement from the provisions of the act of July 24, 1886. In my judgment this result was of palpable value to the company, sufficient, I suppose, to preserve its stock from material depreciation. Other cases also are known to me, though not with the same familiarity. But in short I may state that the company habitually looks to the act of 1866 for protection against hostility and injustice on the part of State Legislatures and municipal corporations. I doubt whether but for the provisions of that act it would be practicable for any telegraph company to afford to the people of the United States extensive facilities for the unbroken transmission of intelligence from one portion of the country to another.

Cross-examination *de bene* by Mr. BLISS:

Q. I read to you the following sections from the Revised Statutes of New York, volume 3, 8th edition, page 2061, section 5: "Such association is authorized to construct lines of telegraph along and upon any of the public roads and highways or across any of the waters within the limits of this State by the erection of the necessary fixtures, including posts, piers, or abutments for sustaining the cords or wires of such lines, provided the same shall not be so constructed as to incommode the public use of said roads or highways or injuriously interrupt the navigation of said waters, nor shall this act be construed as to authorize the construction of any bridge across any of the waters of this State." I understand this is a reprint of the original act of 1848. Am I right in the assumption that this is a subsisting law of the State of New York at the present time?

A. I suppose it to be so.

Q. Will you please state what advantages the Western Union Telegraph Company derives under the act of 1866 which is not insured to it under the section which I have just read?

A. I think the question is answered by the results in the case of the Western Union Telegraph Company against the mayor
141 and others, to which I have referred. In that case it was held by the courts of the State—and the United States court, in its opinion upon an interlocutory application, took substantially the same ground—that the provisions of that act were not at all inconsistent with the position of the board of electrical control in requiring the Western Union Telegraph Company putting its wires under ground when directed so to do by the board of electrical control; and not only so, but that the exercise of judgment by the board as to the practicability of the Western Union Telegraph Company to put its wires in the subways as then constructed was an exercise of judgment which was not subject to review by either the courts of the State or of the United States. It is clear, in my judgment, that but for the act of July 24th, 1866, we should have been required to take our wires off the elevated roads and put them under ground irrespective of the practicability of working them in those conduits, and irrespective of the fact that they were not only inconveniencing nobody, but were practically out of sight on the structures of the elevated road. In short, a sweeping order had been issued, if I remember right, by the board of electrical control to the company forthwith to remove all its wires from the elevated structures and put them in conduits.

Q. But do you not understand that the order removing the wires to the subways was predicated upon the assumption that they were an inconvenience and an interference with the appropriate use of the streets as thoroughfares for ordinary traffic?

A. So far as concerns the removal of the wires from the elevated railroad structures, what motive or assumption the board predicated their action upon is only surmise with me, and my surmise is not such as is presupposed by your question. Certainly the assumption was a violent one, if that was the basis upon which their action was, in fact, predicated.

Q. Was it not held by Judge Wallace that the existence of wires along the elevated railway structure was not an inconvenience to the public traffic or the use of the streets as a thoroughfare,
142 and that if it had been an interference with the use of the streets as a thoroughfare, notwithstanding the act of 1866, the State authorities might require the wires to be placed in the subways?

A. I have not read the opinion of Judge Wallace for some months. The essential feature of it, to my mind, was that he held himself precluded from questioning the action of the board or passing at all upon the question of public inconvenience except where he acquired a jurisdiction under the act of July 24, 1866.

It is stipulated that either party shall have the privilege of reading from the record of the case of The Western Union Telegraph Company against The City of New York and others, 38 Federal Reporter, at page 552, as a part of the record herein, and also the record in the Supreme Court in the case of The Telegraph Company against The State of Texas, 105 U. S., 460.

Q. Do you not understand that the Western Union Telegraph Company, prior to this proceeding to which you have referred, had acquired certain rights in the highways of the city through which it could claim a protection for its continued existence, except in cases where it interfered with the public use of said highways?

A. I contended sincerely and very earnestly for that position, which I believed to be correct. I was unable to obtain for my contention the concurrent judgment of the court in any such way as to afford practical relief, the court taking the ground that the board of electrical control was the exclusive judge of the question of inconvenience, and that board being, as shown by the record, directly under contracts with the concern pecuniarily interested to do all in its power to compel the telegraph companies to go into its subways. By this means, as I judged, the board of electrical control had peremptorily divested itself of all capacity for impartial judg-
143 ment, yet I was unable to induce the courts to take the position that the action of that board could, under the circumstances, be reviewed.

Q. Do you understand that there is anything in the New York case referred to or in the decision of Judge Wallace to the effect that your rights might not have been sustained under the State statutes (that is, your rights to continue to exercise your franchise in the highways where you had acquired a property interest), providing you did not interfere with the public use of said ways as thoroughfares?

A. That question presents, in my judgment, a fallacy turning upon the question of interference. The company's position was that to go underground under the circumstances was not only interference but destruction; and the ruling of the courts was that as long as the board of electrical control took the position that it was not an interference the company could not be heard in its own behalf to the contrary. The result would have been severe injury and loss

of revenue to the company, which was avoided by the position taken by Judge Wallace that a certain part of the streets of New York were carved out into a distinct estate by the acts incorporating the elevated railroads and what had been done under those acts, and were in so far removed from the jurisdiction of the courts of New York as to the matter then under consideration. This proposition, I ought to say, was under another act of Congress creating all railroads post roads, and so bringing them within the direct terms of the act of July 24, 1866, so that Judge Wallace could take the position that as to the elevated railroads the State and the board of electrical control, acting by authority of the State, were deprived of jurisdiction to order the wires taken down.

Q. I read to you the following extract from the opinion of Judge Wallace in said case: "The privilege to maintain telegraph wires over and along post roads is not to be construed literally as to exclude regulations by the State respecting location and mode of construction and maintenance which the public interests demand, but is to be construed so as to give effect to the meaning of Congress,
which was to grant an easement that would afford telegraph
144 companies all necessary facilities, and which, to that extent,
would be beyond the reach of hostile legislation by the
States. Thus interpreted, the grant is no more invaded when the regulation requires the wires to be placed in conduits underground than it would if they were required to be placed in conduits along the surface of the streets; and when this becomes necessary for the comfort and safety of the community, such a regulation is as legitimate as one prescribing that the poles should be of an uniform or designated height or should be located at given distances apart or at designated places along the streets." I understand from this clause of the judge's opinion that the case went off upon the question that the existence of the wires on the structures of the elevated railways was not an interference with the use of the highways for thoroughfares, and that the rights of the corporations which had attached to maintain its wires on these streets could not be disturbed, except, as above intimated, for cause; and I understand that the company claimed that these rights were secured to them and existed in them under the statutes of the State of New York as well as under the act of 1866, and that the conclusion of the judge could have been predicated upon the act of the State of New York as well as upon the act of Congress.

A. If you had been present at the argument and heard the remarks of the court, you would have understood distinctly that whatever the opinion of the court might have been predicated upon it was predicated upon the act of Congress, and I think a close study even of the opinion will show plainly that the court held that, off the elevated roads, it could not inquire in the question of the public convenience, but must accept as peremptory the declaration of the board, while on the elevated roads the order shows that in the face of a peremptory order from the board of electrical control at once to take all wires off those roads, the court issued an order enjoining not simply the removal of the wires from the elevated roads, but

allowing the putting of more on the elevated roads without permits from the board.

Q. Referring to the decision in the Texas case, will you
145 explain more fully how the act of 1866 is involved, in distinction from the provision of the Constitution which secures interstate commerce against interruption?

A. In the first place, it was the act of 1866 upon which the Supreme Court of the United States, in the Pensacola case, expressly recognizes telegraphy as a feature of interstate commerce, and in the decision in the Texas case the Supreme Court again models its decision upon its decision in the Pensacola case; and in other cases, particularly in the Massachusetts case, which is perhaps more familiar to you than to me—I do not at this moment remember the volume or the case, but can refer to it in a moment—the Supreme Court of the United States expressly declares the effect of the act of 1866, and the Western Union Company's acceptance of that, to be to make the Western Union Telegraph Company a direct agent of the Government of the United States, as well as an instrumentality of interstate commerce. This direct and express recognition of the company by the Congress of the United States in that capacity gives it a national standing and recognized character as an agency of interstate commerce, which helps it continually, in the courts and out of them, to secure, in the language of the Supreme Court of the United States, referred to also by Judge Wallace in the New York case, "protection against hostile legislation."

Q. Is not the question of whether or not the transmission of intelligence in commerce, within the meaning of the word in the Constitution, which prohibits interference therewith, independent of the act of 1866?

A. It may be so. What I was pointing out was that the act of 1866 gave, if I may employ a figure, the stamp of the mint to the bullion of the coin, and obtained for it a recognized character which adds distictly to its value.

Q. Do you mean that the act of 1866 in the slightest degree added to or detracted from the definition of the word "commerce," in view of the question of whether or not the transmission of intelligence by electricity is commerce within the provision of the Constitution?

146 A. In the first place, I am of the opinion that the act of 1866 did definitely hasten and facilitate a judicial declaration that the transmission of intelligence by telegraph is commerce. In the second place, I am of opinion that the judgments of the Supreme Court and of the other courts above referred to have and do impress upon the public mind a knowledge of the fact that telegraphy between the States is interstate commerce and entitled to protection as such. Quite aside from that, however the fact that any action brought by the Western Union Telegraph Company, claiming protection under the act of 1866, *ipso facto* confers upon the courts of the United States a jurisdiction to consider and try that case is of constant and practical value in securing to it justice, as notably in the New York case above referred to, in which, if my recollection serves me

right, any spectator would have been convinced that the circuit court of the United States would never have entertained the case but for the fact that the bill was grounded upon a statute of the United States, to wit, the act of July 24, 1866.

Q. If, as you say, the transmission of intelligence by electricity from one State to another is interstate commerce, would you not have your protection against unreasonable interference therewith over the highways, under the provision of the constitution referred to independent of the act of 1866, as you would have a right, if you had acquired the right of way, to extend your railroad through a State of the United States, without the power of interruption of traffic by local authorities?

A. I do not think we should have the same right, either in degree or value.

WAGER SWAYNE.

Subscribed and sworn to before me this 21st day of December, 1889.

WM. J. HARDING,
Notary Public, New York and Kings Counties,
State of New York, Special Examiner.

147 JAMES M. DRAKE, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. ARTZ:

Q. You are a stock broker?

A. Yes, sir.

Q. How long have you been engaged in that business?

A. Since 1852.

Q. Continuously during that time?

A. A portion of the time I was not in active business. I was always interested in business.

Q. When was that portion of the time?

A. That was from 1864 for some years.

Q. When did you resume active business?

A. In 1878.

Q. Have you dealt in any special line of stocks?

A. No; I have been a general broker in all the active stocks that are dealt in on the "street."

Q. Do you mean to include telegraph stocks?

A. Yes, sir.

Q. What principal stock; in any special company?

A. I have dealt more largely in Western Union Telegraph stock than any other.

Q. Can you give me some idea of the extent of your dealings in Western Union?

A. It would be very vague. My operations have been more active than extensive, perhaps. I have been an active operator in it always.

Q. Have you bought considerable telegraph stock for investment?

A. Yes, sir; from time to time.

Q. In advising purchasers regarding telegraph stocks, what elements do you take into consideration as affecting the market value of the stock?

A. I suppose the value of the stock and the market value of the stock are synonomous terms. Generally, I should say the plant, as it is commonly understood, its ownership of stocks and bonds in other companies, the leases and privileges of the company,
148 whatever they may be, constitute its intrinsic value, together with the extent of its business.

Q. Can you name any of the principal privileges that you take into consideration in advising purchasers?

A. I have always considered the leases which the company has with the different railroads of the country as being a very important element, or the privileges which they have derived by general laws which have given the advantages, perhaps.

Q. Have you ever heard of any relations between the Government and the company?

A. There was a law, which was passed, I think, in 1866 or thereabouts, granting what I always conceived to be valuable privileges to telegraph companies. I have always understood that the Western Union Telegraph Company had the privileges which that law confers when it accepted the act.

Q. What have you conceived those privileges to be, speaking generally?

A. I do not quite understand your question.

Q. What do you understand in a general way was granted to the company by that act of 1866?

A. I thought you meant as a general question. Well, the special advantage that I had always understood the company enjoyed from that act was the fact that it entitled them to extend their wires throughout the country without interference on the part of local authorities.

Q. Do you consider that an element affecting the standing of the company or the value of its stock on the market?

A. Yes, sir; I should say so; decidedly.

Q. Have you, in fact, considered it so in purchases for yourself and in advising others to purchase?

A. I have; yes, sir.

Q. If that privilege were withdrawn, what effect, in your opinion, based upon your knowledge of stocks and of this privilege, would it have upon the market value of the stock?

A. It would have a seriously depressing effect upon the market value of the stock.

149 Cross-examination *de bene* by Mr. BLISS:

Q. You say one of the advantages derived from the act of 1866 is the right to extend telegraph lines without the interference of local authorities?

A. Yes, sir.

Q. Do you understand that the Western Union Telegraph Com-

pany under the act of 1866 has a right to extend its lines over the post roads without the aid of local authorities?

A. Yes, sir; I have had that general impression.

Q. Your estimate as to the value accruing from the act of 1886 is predicated upon that understanding of the statute?

A. I have not carefully examined the law, but I have always understood, and I think it is the general impression among persons who, like myself, are dealing in the stock, that there is that advantage and others, perhaps, that the law contains, but I am not familiar enough with the law to explain it.

Q. Within a State which by its own statutes authorizes telegraph lines to construct their lines on all its highways the act of 1886 would add no substantial value, would it—that is, if they already had the right under local laws to extend their lines over all the highways of the State?

A. I suppose any State in which a law of that kind is now on the statute books would have the privilege of repealing that law at any time, and therefore the fact that the telegraph company has authority from the Government would be a very valuable privilege.

Q. Then it comes back to the proposition that you understand that the company under this act of 1866 without the aid of local laws has a right to extend its lines throughout the State?

A. I have always understood that if any local authority attempted to interfere with their extending their lines they could fall back upon the privilege which they enjoyed under the act of 1866.

Q. And that if they did nothing and did not interfere the
150 act of 1866 would entitle them to extend their lines throughout all the post roads of the country?

A. If I understand you, you are endeavoring to get at my estimate of the value of the privilege which is conferred by the law of 1866.

Q. Yes, sir; and upon what you predicate it.

A. I think I have given my opinion upon that subject emphatically.

Q. Do you know of any telegraph company that is confined in its operations to a single State?

A. Not at present.

Q. In this estimate of valuation you assume, do you not, that if a telegraph company has acquired the right of way of parties interested therein the State may prevent the transmission of intelligence by electricity across its territory from one State to another?

A. It seems to me that would be a question for a lawyer to answer. I cannot answer that question.

Q. But have you not said that you understood that the act of 1866 was valuable to the Western Union Telegraph Company because it secured to that company the right to extend its lines throughout a State?

A. I have understood that the State of Florida attempted to interfere with the Western Union Telegraph Company in extending its lines, and the company were able to extend them in consequence of this law of 1866.

Q. Do you understand that except for this law of 1866 a State like Florida could prevent the transmission of intelligence through and throughout a State?

A. I think that is another form of the question you have already asked me and which I said I could not answer.

Q. Then do I understand you to say that you cannot state whether or not, except for the act of 1866, the Western Union Telegraph Company could or could not extend its lines through and throughout a State?

A. I have always understood that that act conferred that privilledge.

Q. And your estimate of valuation is predicated upon that understanding?

151 A. Yes, sir; so far as that particular privilege of the company constitutes an element of its value as a corporation.

Q. Are you a stockholder in the Western Union Telegraph Company?

A. Not at present. I have stock in the name of my firm, belonging to my principals, and which was bought for their account by my advice.

JAMES M. DRAKE.

Subscribed and sworn to before me this 23d day of December, A. D. 1889.

WM. J. HARDING,
Notary Public, New York and Kings Counties,
State of New York, Special Examiner.

Proceedings Continued.

NEW YORK, *December* 11, 1889.

Present: The examiner; Henry C. Bliss, Esq., assistant attorney general for the Commonwealth; C. W. Artz, Esq., of Messrs. Dillon & Swayne, for the defendant.

NORVIN GREEN recalled:

Counsel for the Commonwealth states to counsel for the Western Union Telegraph Company and to Doctor Norvin Green, president of said company, that since the termination of the last examination of Doctor Green it has come to his knowledge that there are in existence certain letters written by the president of the Western Union Telegraph Company to the Postmaster General which it
152 seems desirable to introduce into the case. These letters are as follows:

EXECUTIVE OFFICE,
WESTERN UNION TELEGRAPH COMPANY,
NEW YORK, *July* 2, 1889.

DEAR SIR: Your circular letter of June 29 ultimo, addressed to the Western Union Telegraph Company and to several other telegraph companies, of which I am president, has been duly received.

The rate you propose for Government telegraph service during the ensuing fiscal year, one mill per word by day or night without respect to distance, is so far below the actual cost of the service that I respectfully ask that you will suspend its official declaration and afford the telegraph companies an opportunity of demonstrating by facts and figures its great injustice.

Under the rates in force for several years past it is doubtful whether we have not been doing the Government, telegraph service at a loss; certainly we have with little or no profit.

The average cost to this company for transmitting and delivering messages has been steadily reduced from 63.4 cents per message in 1867 to 23.4 cents in 1886, to 23 cents in 1887, and to 23.2 cents in 1888. The figures represent the lowest average cost per message that we have ever been able to reach with all the economies of time and labor we could apply to the service, and the correctness and justice of these figures were established by abundant testimony before the Senate Committee on Post Offices and Post Roads in the spring of 1888.

The Government rates of the past year, with the minimum of 20 cents, have possibly paid an average of 23.2 cents, which is the average cost to this company; but the Government service is exacting, entitled to preference under the law, and requiring the promptest transmission and delivery.

The Post Office Department has for many years taken great pains to ascertain the cost to railroad companies of carrying the
153 mails on fast trains, and has with great care adjusted the rate per mile on the several classes of mail transportation so as to pay the railroad companies a fair compensation for the service rendered. I cannot believe that your administration of the Department would intentionally make an exception to this basis of equity and fair dealing in its requirements of telegraph companies. Indeed, it is worth consideration whether such action would not be beyond the warrant of the Constitution and amount to an appropriation of private property for public use without due compensation therefor.

Your proposed order would compel this company to transmit a message of twenty words from Washington to Portland, Oregon, and deliver the same for 2 cents, which is the cost of delivery alone in that city. That service would involve five relay transmissions, with a competent operator at each repeating station, requiring no less than seven operators to handle it, also clerks to receive, check, and book it, besides its due proportion of the cost of maintaining the lines, supplying batteries, stationery, etc. The total cost of the service to this company for such message would not be less than 46 cents, or twice the average cost of all our messages.

Trusting I shall be awarded an opportunity of a hearing in person, and craving indulgence for the length of this letter,

I have the honor to remain, very respectfully yours,

NORVIN GREEN, *President.*

Hon. John Wanamaker, Postmaster General.

EXECUTIVE OFFICE,
WESTERN UNION TELEGRAPH COMPANY,
NEW YORK, *July* 11, 1889.

DEAR SIR: Title 65, Revised Statutes, embracing the acts
154 of July 24, 1866, and of June 10, 1872, was the outgrowth of the first efforts to induce Congress to establish a Government telegraph.

A scheme was pressed before a committee of Congress to incorporate a new telegraph company by the General Government, with which the Government should contract to transmit telegrams at a price to be agreed upon, the Government receiving and delivering the messages, and being the only party known to the patrons of the telegraph. This scheme was justified on the ground that the Government had no right to take existing telegraph properties except at prices and on terms acceptable to the companies that owned them; and the scheme was objected to by the telegraph companies then existing on the ground that the Government entering upon the telegraph business at rates that would not pay expenses would simply destroy existing telegraph properties. It resulted in a compromise between the telegraph companies and the committee of Congress, of which, I believe, the lamented Garfield was chairman, giving to the telegraph companies certain franchises and privileges and to the Government certain advantages and privileges, including priority of service, at rates to be annually fixed by the Postmaster General, and, what was deemed at the time of most importance to the Government, the right to take existing telegraph properties of the companies who accepted the provisions of the acts at an appraised value, to be ascertained by arbitrators, as described in section 5267.

This compromise agreement was enacted into law, subject to formal acceptance by the telegraph companies, and their acceptance filed with the Government rendered it to all intents and purposes a compact between the Government and the telegraph companies, the operation of which was intended to be that the Government should have the right to take all telegraph properties, and that if it should elect to establish a Government telegraph it should take existing telegraph properties on terms to be ascertained as the law directs.

This section, 5267, Revised Statutes of 1878, annotated as being enacted June 10, 1872, giving the Government the right to
155 take telegraph properties, is in substance the same language as the proviso at the close of section 3 of the original act of July 24, 1866, and therefore a part of the compact accepted by the Western Union Telegraph Company in June of 1867.

This does not appear to have been considered an imperative duty on the Postmaster General, for no action seems to have been taken by that officer in the direction of fixing rates until July 1 of 1871, when the necessity for it was alleged to have arisen by reason of the complicated character of the service in transmitting the signal weather reports.

A conference with the telegraph companies was invited by Post-

master General Creswell, through Captain Howgate, the acting head of the Signal Service, and a discussion of the subject was had in Washington, President William Orton representing the Western Union Telegraph Company, and the Postmaster General having the assistance of Assistant Attorney General Whiting and the head of the Signal Bureau, and the rates were fixed satisfactorily to the telegraph companies. They were not annually revised until some years later, and in almost every instance the telegraph companies were consulted as to what they could afford to do the service for. In two instances Postmaster General Jewell and Postmaster General James, at the instance of the telegraph companies, recalled and modified their orders after they had been officially proclaimed.

The language of the act—that messages between the several departments of the Government "shall have priority over all other business at such rates as the Postmaster General shall annually fix"—may be construed as contemplating the fixing of a higher rate than is paid by other patrons because of such priority in transmission over all other business. Certainly it never contemplated conferring the power to fix the rates below the actual cost of the service. Such action is nothing short of confiscation and expropriation of the property and services of employees to the use of the Government without due compensation therefor.

156 Twenty cents for twenty words or less for distances of 1,000 miles or less and 1 cent for each additional word and one-tenth of a cent per word for each additional 100 miles — fraction thereof is, for distances of about 1,000 miles (as between Washington or New York and St. Louis or Chicago), just one-half the rate paid by the public on current messages. For distances of 300 miles and under it is about three-fourths the commercial rate. Our gross receipts for the last fiscal year, as shown by the annual report, were $19,711,164.12, and the current working expenses were $14,641,592.18, leaving the profits $5,070,571.94, out of which $530,258.30 was paid for interest and sinking fund on bonded debt, which is part of our capitalization.

It will be readily seen that the working expenses, without any return for any part of the capital employed, costs within a fraction of 75 per cent. of the total earnings. If, therefore, the Government rate is less than 75 per cent. of the rate to the public (as it undoubtedly is), then the Government business is being done at a loss.

The table on page 9 of the annual report shows the average cost to the company of handling messages to be 23.2 cents per message. If the Government business does not pay something more than this average, then it must be done at a loss, for the messages, in order to yield such an average, must be considerably above the average length of business messages (about seventeen words), and it is a very exacting service, having precedence over all other business and requiring prompt and often long-distance messenger deliveries or rewriting in some cases to deliver by special wires.

These exhibits demonstrate that the rate as fixed for the past year is a great injustice to the telegraph companies, and not on a fair business basis of living profits awarded to railroad companies and

other corporations for services rendered. The rates ought therefore to be increased rather than diminished.

By the present rate the Government is saving a large sum, probably $100,000 annually, by the reduced cost of its telegraph service below what other patrons have to pay, and that saving is
157 necessarily made up off other customers. In all justice and fair dealing the existing rate should therefore be increased. To do the Government service for nothing necessarily imposes heavier burdens on the people who sustain the telegraph. If the railroads had to haul the mails for nothing they would have to collect more for other service to sustain the expense of operation and pay a moderate return for capital employed. The Government is as able to pay and every business consideration demands that it shall pay a fair and reasonable consideration for whatever service it may require.

As to the rate named for the ensuing fiscal year in your official circular to the telegraph companies of June 29 ultimo, which you say "will be one mill a word irrespective of distance for all distances day or night," I have only to say that it would not reimburse what this company has to pay for the clerical service in receiving, counting, checking, routing, numbering, and booking the messages before its transmission; that it would not reimburse what this company has to pay for the time of any one of from 7 to 11 operators that would be engaged in the transmission of a message from Washington to Portland, Oregon; that a message of the ordinary length would not reimburse what we had to pay for its delivery by messenger after it has reached its destination, to say nothing of any part of the cost of maintaining the lines, battery supplies, stationery, superintending, offices, and other incidental expenses, and, finally, it would not reimburse the cost to this company of gathering up business, making up the accounts, and making the collections.

A message handed in at Washington is received, counted, and checked by the clerk at the window. It is then sent to the operating-room, where the circuit manager routes and numbers it and sends it to the proper instrument. After its transmission it goes to the book-keeper to be entered. What we have to pay for the time of these several employees is certainly more than one cent, the value of a ten-word message, and probably more than two cents, which would be the price of a twenty-word message at the rate named.

158 We pay our operators of the class that handle Government messages an average of $70 a month, or about $2.80 per day for the twenty-six working days of the month. It is a very fair day's work to handle 180 messages, and they rarely average that per operator in our large offices; so that each operator handling messages costs us a full one cent and a half per message. We employ a large number of operators in Washington and elsewhere by the hour, paying forty cents per hour. They rarely handle thirty messages per hour, the average being about twenty-six, which yields about the same result in the case of handling the messages.

In further examination of the practical operation of transmitting messages from New York or Washington to points on the Pacific

coast I find they are not sent through repeaters all the way in one compound circuit. All west-bound business is delayed at Chicago or St. Louis, so that a message is first sent from Washington to Chicago through one repeating station, requiring three operators. From Chicago to San Francisco it is transmitted in one compound circuit through four intermediate repeating stations, employing six operators, which, added to the three first named, makes nine. Then if it has to go to Oregon, passing through repeaters at one intermediate station, it would require three more operators.

This company transmitted during the last fiscal year 51,463,955 messages. The cost of messenger service was, in round numbers, $1,120,000, making the average cost of delivery per message about 2⅛ cents, although a large number of messages to the floor of exchanges, to newspapers, and by special-wire deliveries did not require the use of a messenger. In fact, in most large cities, as in Washington city, we pay by contract with district messenger companies two and one-half cents per message for making deliveries. You may answer that the Government sends letters 1,000 miles and delivers them for two cents; but the Government nor any other patron of the telegraph would not submit to the class of deliveries made by the letter-carriers. In fact the Government itself, in this
159 city, charges ten cents per letter for special deliveries; and every telegraph message requires a special delivery. Over more than one-half the area of this city we pay five cents per message for delivery.

In respect to the cost of gathering up the business and making up the accounts for collection at many of our small stations, they have but one Government message during a month. The War Department requires that the messages themselves be rendered as vouchers. If an agent or employee of any of the Departments is detained at a small station by railroad interruption and sends a message of ten words the manager of that station finds it his duty to enclose that message by mail to the auditor of the company here for collection. That would cost this company a two-cent postage stamp. Then we shall have sent the message, paid one and one-half cents to each operator engaged on it, two and one-half cents for delivering it, and two cents to the Government to forward the original message as voucher, and when the account is made up we get one cent back.

We have been always ready to serve the Government in the promptest and best manner in our line of business, and have done a great deal for the Government without charge, giving it the use of wires on special occasions and opening new stations at considerable expense for signal and astronomical observations. We have had our accounts tied up for a considerable portion of our service upon technical rulings upon which we have been unable to procure a trial and decision of the courts until the arrears have reached the neighborhood of $100,000.

As instructed by the executive committee of the board of directors, I most respectfully make this the protest of the Western Union Telegraph Company and of the subordinate telegraph companies which it controls against any further reduction below the rates in

operation during the last few years of toll to be paid by the Government for the transmission of its messages as a wrong and in-
160 justice to this company, to its thirty-six hundred stockholders, and to its million of other customers.

I have the honor to remain, most respectfully yours,

NORVIN GREEN, *President.*

Hon. John Wanamaker, Postmaster General, Washington, D. C.

EXECUTIVE OFFICE,
WESTERN UNION TELEGRAPH COMPANY,
NEW YORK, *July* 16, 1889.

SIR: I beg leave to acknowledge receipt of your polite favor of the 13th instant.

The information furnished your Department that this company "has been making rates to various large corporations that are in some instances as low as the figure now proposed for the Government service" is without foundation in fact. I know of no instance in which any corporation, large or small, has a rate for telegraph service that averages as low as that which has been fixed for the Government service annually since July of 1884. We have contracts for an exchange of service to a limited extent with a large number of railroad companies, they carrying our men and material and furnishing us labor in constructing, repairing, and rebuilding lines in return for telegraph service off their lines of road to a limited amount per annum.

We have contracts to do service at half the commercial rates with several transportation companies, partly in consideration for what they do for us and partly in compromise of their claim that the service should come under our railroad contracts because they are subordinate organizations of the railroad companies; but
161 these contracts stipulate that such half rates shall not reduce the compensation for any message below 20 cents.

Our lowest rates should naturally be those for the transmission of news for publication. It is not an exacting service, but is, in a great measure, a deferred service, mostly done at night, and the great bulk of the reports are sent to a large number of places simultaneously by one sending operator. This is a service of great public interest, towards which we have contributed largely, frequently without profit, and not infrequently without any compensation therefor. For many years we have distributed the President's message over the wires and given it to every newspaper in the country without charge. During the protracted illness of President Garfield, and later of General Grant, we sent out daily bulletins of their condition to all parts of the country free of charge, as we have also frequently distributed the doings of large political or benevolent assemblages.

I cannot conceive why the Government should treat this class of service as a measure for fixing rates for Government messages.

I have had compiled in tabular form the rates for Government service as fixed by the Postmaster General since they were first fixed

in July, 1871, now 18 years, a copy of which I enclose for your convenient reference. It will be observed that the rate has been one cent a word within certain limited circuits from the beginning, the only reductions made being by increasing the length of the circuit. After six years each circuit was increased from 250 to 500 miles by Postmaster General Key, and six years later, by Postmaster General Gresham, the circuit was made 1,000 miles. The minimum for the first twelve years was 24 cents for a message, and for the remaining six years it has been 20 cents. There was no limit to the maximum rate until July, 1875, when Postmaster General Jewell made a maximum of ten cents per word for long distances. This was reduced by Postmaster General Gresham to 2½ cents per word, which has remained the maximum since.

162 After trying the signal service or weather reports at 2 cents a word a circuit for one year it was demonstrated that the service was being done at a loss to the telegraph company, and the rate was increased to 3 cents, where it has remained.

This question came up again under Postmaster General Jewell, and was carefully investigated by Assistant Attorney General Whiting, who, after taking testimony, reported that three cents a word per circuit was as low as the service could be done without loss.

Has it occurred to you that the rate named for the ensuing year is only the one, twenty-fifth part of the rate enforced for the past five years on distances of 2,500 miles and over? If the Postmaster General can lawfully make the rate one mill per word, which is practically nothing, he would have the power to make it one mill per 100 words, which would only more patently obtain the Government telegraph service without compensation therefor.

I beg to add that after an experience of thirty-five years in the management of telegraph companies I am thoroughly satisfied that no message can be received, transmitted any distance, enveloped, and delivered by messenger for less than 20 cents without the service being done at a loss.

I have the honor to remain, most respectfully yours,

NORVIN GREEN.

Hon. John Wanamaker, Postmaster General.

EXECUTIVE OFFICE,
WESTERN UNION TELEGRAPH COMPANY,
NEW YORK, *July* 27, 1889.

DEAR SIR: Pending our correspondence in respect to your notice of the rate to be fixed for the Government telegraph service I have not given any information of the questions raised nor answered any inquiries of news reports in respect thereto for publication;

163 but your circular to the telegraph companies of July 13, in which you say "that the rate proposed was upon information furnished to this (your) Department that your (our) company has been making rates to various large corporations that are in some instances as low as the figures now proposed for the Government services," was printed verbatim in a number of the newspapers

even before I had received the original by post. I repeatedly declined to be interviewed even upon this most remarkable statement; but its extensive publication throughout the country by many papers in justification of the rate named for Government service for the ensuing year and by others with comments on the alleged unwarrantable discrimination in rates to our customers has proved so embarrassing in our business relations with the various classes of patrons of the telegraph that, in justice to the interests I represent, I can not longer allow the impression it has made to remain uncorrected.

I wrote you on July 16th that "the information furnished your Department that this company 'has been making rates to various large corporations that are in some instances as low as the figures now proposed for the Government service' is without foundation in fact." "I know of no instance in which any corporation, large or small, has a rate for telegraph service that averages as low as that which has been fixed for the Government service annually since July of 1884."

I did not infer that in the language "various large corporations" you could have referred to the Press Association, for very few, if any, of these associations are incorporated, and the larger of them I know are only private associations. Nevertheless, after explaining to you that our so-called free service to a limited extent for railroad companies was paid for in kind by the free transportation of men and material, services of their railroad operators, and in most instances the furnishing of labor and other assistance in maintaining the lines I went on to say that "our lowest rates should naturally be those for the transmission of news for publication. It is not
164 an exacting service, but is, in a great measure, a deferred service, mostly done at night, and the great bulk of the reports are sent to a large number of places simultaneously by one sending operator."

"This is a service of great public interest, towards which we have contributed largely, frequently without profit, and not infrequently without any compensation therefor. For some years we have distributed the President's message over the wires and given it to every daily newspaper in the country without charge. During the protracted illness of President Garfield and later of General Grant we sent out the daily bulletins of their condition to all parts of the country free of charge, as we have also frequently distributed the doings of large political or benevolent assemblages. I cannot conceive why the Government should treat this class of service as a measure for fixing the rates for Government messages."

I might have added that in every scourge of yellow fever and cholera and in every devastation by flood or fire we have done for public information and for private relief a large amount of service without charge. In the late great disasters at Johnstown and Seattle our entire available facilities at those places were given to public use for several days; but it had never occurred to us that the Government was in such straits as on this account to require its services to be done practically for nothing or without paying a just com-

pensation therefor, as I believe the Constitution and the laws intended and will compel it to do.

Except the arrangements with railroad and transportation companies referred to and rates for press and commercial news service, we make no reduced rates to any corporations or other patrons, large or small. For messages transmitted and delivered to a single address the Government is our only customer that enjoys reduced rates.

As to the great privileges and benefits derived by this company from the act of 1866, they are purely imaginary. I am not aware that we have ever taken a stone or stick of timber or appro-
165 priated a foot of land belonging to the Government under that act, and where we have needed to build a line across lands belonging to the Government—as in a late instance, across the lands along the canal around the Falls of Ohio—we have had more trouble and delay in procuring the right to set up our poles than if the lands had belonged to private parties.

I have the honor to remain, most respectfully yours,

NORVIN GREEN, *President.*

Hon. John Wanamaker, Postmaster General.

EXECUTIVE OFFICE,
WESTERN UNION TELEGRAPH COMPANY,
NEW YORK, *August* 8, 1889.

DEAR SIR: Acknowledging the receipt of your letter of August 2, I beg to say I much regret that the publication of my letters to you, to which you refer, was rendered necessary by the extraordinary statements, "on information furnished this (your) Department," contained in your letter of July 13 and extensively printed in the newspapers on the following day.

You again refer to the privileges and benefits derived by this company through the acts of Congress, and especially the act of 1866. You say: "Under these grants the company has claimed the right to use, without compensation of any kind as to right of way, all the highways of the country, on the ground of their being post roads. It has broadened this claim to the extent that the streets of cities and towns are also post roads, and therefore open and free for its occupancy and use. The courts have sustained it in this claim."

Either you or we are very badly informed by our respective legal advisers as to what has been claimed by the telegraph company and held by the courts in respect to the scope and authority of
166 that grant. I have had occasion from time to time to go through the records in a great many cases, but I do not recall any instances in which such claim has been made and sustained by the courts. What we understand the Government did give us in the act of 1866 was a franchise and right to do telegraph business in all the States, and this franchise was given alike to all telegraph companies or other parties who might accept it; and subsequently, by what was known as the Butler amendment, it was especially extended to all railroad companies. But the act never assumed to give us, and could not give us, the right to plant our

poles on any but lands actually belonging to the Government; and that right we have very rarely exercised, except when the Government wanted us to extend lines for the convenience of the Government into its navy yards and military posts and stations, or to its Department quarters in the city of Washington. Had you carefully read the decision in the Pensacola Telegraph case, to which you refer, you would not have fallen into such a grievous error upon this point. Chief Justice Waite, in the body of the opinion, thus defines the scope of the act of 1866 under consideration:

"No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted."

The decision in this case, therefore, was that the State of Florida could not prohibit the Western Union Telegraph Company from erecting and operating its lines of telegraph in that State after it had acquired a right of way for its plant from a railroad company of that State, but did not hold that it was except from the obligation to buy or condemn under State statutes the property necessary to enable it to build its lines.

167 The railroads are post roads as well as some of the highways, and if the Government gives us the right of way on post roads why should we have to pay the railroad companies for it? We have to contract for and obtain our rights of way from the parties who own them, whether railroad companies, turnpike and plank-road companies, or individual land-owners; and in case of streets and highways we have to obtain license from the city, society, or State authorities, or condemn under authority of State laws.

I sincerely wish that your ideas of the law that we "are in fact occupying many thousands of miles of post roads and are privileged to occupy all the highways in the United States" under the grants of that act may prove sound in law; but we have not relied upon that interpretation of the law, and fear it would not be sustained by the courts. Our occupancy of the streets is always by license of the local authorities or of the State, and in the case of the Elevated Railroad Company, in the city of New York, to which you refer, we pay the companies who own the structure for the right to string our wires thereon.

The act to which you refer gives the telegraph companies accepting it the right to take stone and timber from the public lands, and to pre-empt and enter not exceeding 40 acres for each station. We have never needed to use any stone; and since the passage of that act the railroads across the continent have afforded ample facilities for transporting cedar for poles, which is more durable and economical than the native timber that might possibly be found accessible on unoccupied Government lands. As to pre-empting 40 acres

of land for a station, we have found that wherever a telegraph station was needed there was no unoccupied Government lands, and if we were to establish a station on any 40 acres of unoccupied Government lands it would be in a locality that would yield no revenue. It is true, therefore, that we have never taken a stone or stick of timber or appropriated a foot of public land under that law.

168 The franchise granted this company, in common with other parties, was not supposed to be solely for our benefit, but to secure convenient facilities to the public. The effect of establishing our right to do business in Pensacola was to wipe out a charge of $1 for a ten-word message for a distance of 45 miles over a line that claimed the exclusive franchise under the State law, and the establishment of a branch office in the navy yard at that port, which to this day we are operating for the benefit of the Government at a loss, the business of that office not being sufficient to pay the salary of the operator.

Second. We seem to be getting nearer together as to the power and duty of the Postmaster General to name the rate of tolls to be paid on Government messages. I only claim that this power and duty are limited by the Constitution to a just compensation for the service required, and that a just compensation must cover the actual cost of the service, with something added for the use of facilities necessary to perform it, and, as you say the Government is willing to pay just rates, we have come quite to an agreement on the principle that must govern the fixing of rates to be paid.

Third. I still insist that the Government is our most favored customer, and that the rate for Government service during the past five years, considering the character of the service, is lower than that given to any other patron. The Government rate has been 1 cent per word for a thousand miles or less. You may make up a supposed message, with address and signature of unusual length and twenty words in the body, sent a short distance under our half-rate contracts with certain transportation companies and show that it is a trifle less than the Government rate, but the half rate is generally higher, and you forget that this half rate in money is not all we get. To it must be added the value of what those transportation companies do for us. But when you apply even the strongest supposed case to a message between New York and Chicago or Washington and St. Louis you will find the Government rate is the lower.

169 There is no comparison between the service for the newspapers (even the special rates to one newspaper) and messages transmitted for the Government. A special of 1,500 words would make 50 Government messages of 30 words each, each message requiring a separate checking, booking, numbering, routing, enveloping, and a special delivery. We often have a special news report of 5,000 words or more, equal to over 166 messages of 30 words each, while our commercial and social messages average but about 17 words, including address and signature.

In my former statement—that for messages transmitted and de

livered to a single address the Government was the only customer that enjoyed a reduced rate—I distinctly excepted in the context the service for the newspapers, arrangements with railroad and transportation companies, and the distribution of commercial news reports.

It is not true that this company gives the large papers of New York, Chicago, and other large cities a day rate one-half a cent per word and a night rate of one-quarter of a cent per word. That rate applies only between New York, Philadelphia, and Washington. Nor is it true that this company gives the large papers of the large cities any lower rate than it gives the small papers of the large cities or the small papers of the small cities. The press rate, which is based on our commercial rate, is the same to every paper in the same city or town, great or small, whether it does business to the extent of $1 per year or $100,000.

It is not true that the patronage from the press is the most profitable we have. There is little or no profit on the regular press service as a whole, and very little on the special press service, and it would not add to our profit if the rate was made still lower. However, as it is based on our commercial rate, it necessarily is reduced with it. The question of our press rate has been much discussed with the press associations, who, having many lines leased which they operate themselves, are quite familiar with the cost of rendering it, as they are with the cost of like service in other countries,
170 and it was found and admitted that the press rate of this country, considering distances, is the lowest of any country in the world and the most liberal in its application.

On the Signal Service reports, since in 1872, the rate has been reduced, as in case of other Government service, by lengthening the circuits. Until about 1884 the circuit for signal service, paying *u* cents per word, was counted as a practical working circuit. A compound circuit, requiring the use of repeaters, as from New York to Milwaukee, with drops, was charged and paid for as two circuits, or at the rate of 5 cents per word. So also were the circuits from New York to Eastport, Me., and from Cincinnati to New Orleans; whilst the circuit from Chicago to San Francisco was rated as four circuits, or 12 cents per word. San Francisco to San Diego and San Francisco to Olympia, Wash., were each rented and paid for as three circuits, or 9 cents per word. Others were counted double or triple circuits. Now we are only paid 3 cents per word for each of these circuits; so that the rate for Signal Service reports has on a number of circuits been reduced to one-half and on others to one-third of the amount previously paid. If we had been paid last year for this signal service on the same basis as in 1872 we should have received nearly twice as much as we did.

Whilst the rate on Government messages, fixed so nearly at the cost of the service at the start, has not been entitled to and could not be expected to have a corresponding reduction with the rates to the public from time to time, yet the facts show that on a large class of Government business the reduction has been much greater than that made to the public. Up to July, 1877, the Government rate

was one cent per word for 250 miles or fraction thereof, with not less than twenty-five words to be counted. For a fraction less than 1,000 miles, therefore, the rate for a twenty-five-word message was $1, for 2,000 miles it was $2, and for 3,000 miles it was $3; for 750 miles it was 75 cents, and for 500 miles it was 60 cents; whilst for 250 miles or less it has remained the same, except that the
171 minimum is twenty words instead of twenty-five words.

Since 1884 the rates on the same message for 3,000 miles would be 63 cents; for 2,000 miles, 50 cents; for 1,000 miles and all distances under that, 25 cents.

The reduction, therefore, on the long distances has been about 80 per cent.; on 2,000 miles, 75 per cent.; on 1,000 miles, 75 per cent.; on 750 miles, 65 per cent.; on 500 miles and down to anything over 250 miles, 50 per cent.; whilst for 240 miles and less it has remained the same. The average reduction in twelve years has probably been in the neighborhood of 50 per cent.

For the year ending July, 1887, our average rate to the public was 43.6 cents per message. Last year it was 31.2 cents per message, the reduction to the public being something less than 30 per cent. In the same period the cost to the company in handling messages has been reduced from 29.8 cents per message to 23.2 cents, being about 20 per cent., so that the reduction on the Government service has been two and one-half times greater than the reduced cost of handling the messages and two-fifths greater than the reduced rate on commercial messages.

The sum of it all is that the Government has given us nothing that cost the Government anything or that was of any value to the Government to retain—nothing that has not been worth more to the Government and the public that we should have than it has been worth to us; whilst in consideration therefor the Government, by its reserved power, has been making a saving for a number of years at the rate of nearly, if not quite, $100,000 a year in the cost of its telegraph service below what other customers pay, whilst it enjoys, as it should, a preferred service over all other business.

I have the honor to remain, very respectfully yours,

NORVIN GREEN, *President.*

Hon. John Wanamaker, Postmaster General.

172 P. S.—Although I have treated the press service as not properly comparable with the transmission of Government messages, I desire to say that, in point of fact, if the Government had paid us during the past several years the rates stipulated by contract with the associated press on news despatches bearing one address the aggregate revenue for Government service would have been larger than it was at the rates the Government paid.

N. G., *President.*

By Mr. BLISS:

Q. I will ask you if, in fact, as president of the Western Union Telegraph Company, you wrote the letters referred to.

Counsel for the Commonwealth states that he proposes to introduce said letters for the purpose of controlling and contradicting the testimony heretofore given by said witness, and he exhibits these letters to the witness in order *to* that he may make or have an opportunity to make any explanation which he may desire.

A. I have not examined them carefully or compared them with my notes, but they appear to be the letters I wrote. As to the explanation counsel asked me to make, I find that in my letter to the Postmaster General of July 27, in the closing paragraph, I said:

"As to the great privileges and benefits derived by this company from the act of 1866, they are purely imaginary. I am not aware that we have ever taken a stone or stick of timber or appropriated a foot of land belonging to the Government under that act, and where we have needed to build a line across lands belonging to the Government, as in a late instance across the lands along the canal around the Falls of Ohio, we have had more trouble and
173 delay in procuring the right to set our poles than if the lands belonged to private parties."

I had in mind, and the language shows it, the stress the Postmaster General had laid upon the Government giving us stone and timber towards building the lines and the right of way across Government lands and the right to pre-empt and enter forty acres of land at any station we might open. Where I speak of the "privileges and benefits" it should have been "the privileges and benefits referred to or privileges and benefits in that regard were purely imaginary," because, in point of fact, we had not taken any stone or timber. The timber was not fit to use; the pine poles were not worth putting up; the stone we did not need, as we had no abutments or bridges to build, and there was no place where we had opened an office where there was any public lands to enter at a station where it would be profitable to open a station. Where there was a town there were no public lands to enter, and in the country where the lands were open there was nothing to open a telegraph office for. The Postmaster General had also insisted that the act of 1866 gave us the right of any and all post roads, and insisted upon that being a great value to the company. In my letter of August 8 I state:

"Either you or us are very badly informed by our respective legal advisers as to what has been claimed by the telegraph company and held by the courts in respect to the scope and authority of that grant."

Skipping a couple of lines there, which only refer to my opportunities for finding out what the courts held, I say:

"What we understand the Government did give us in the act of 1866 was a franchise and right to do telegraph business in all the States, and this franchise was given alike to all telegraph companies or other parties who might accept it, and subsequently, by what was known as the Butler amendment, it was especially extended to all railroad companies; but the act never assumed to give us and could not give us the right to plant our poles on any but lands actually

174 belonging to the Government, and that right we have very rarely exercised, except when the Government wanted us to extend lines for the convenience of the Government into its navy-yards and military posts and stations or to its Department quarters in the city of Washington."

Then I quoted from the decisions of Chief Justice Waite to show what he held the act to do.

So that in the points upon which the Postmaster General was making his case, in the benefits he alleged it conferred upon us, they were in that regard imaginary; as, for instance, the act does plainly give us the right to take lands and gives us the right to take stone and timber and the right of way across Government lands; but, as we have never needed to use any of those except where the Government needed a line for its convenience, the benefits conferred were imaginary. Nothing practical ever came to us from those items of the act. Further on — the letter of August 2, at page 83 of the report, I say:

"The franchise granted this company, in common with other parties, was not supposed to be solely for our own benefit, but to secure convenient facilities to the public. The effect of establishing our right to do business in Pensacola," etc., "was to wipe out a charge of $1 for a ten-word message for a distance of forty-five miles."

And still further on in the same letter, in the closing paragraph, I say:

"The sum of it all is that the Government has given us nothing that cost the Government anything or that was of any value to the Government to retain; nothing that has not been worth more to the Government and the public that we should have than it has been worth to us, whilst, in consideration therefor, the Government, by its reserved power, has been making a saving for a number of years at the rate of nearly, if not quite, $100,000 a year in the cost of its telegraph services," and whilst it enjoys a preferred service over that of all other business.

As a franchise, I have never doubted its value. As con-
175 ferring upon us any material for constructing our lines or any lands upon which we could erect our offices or any right of way, it has been imaginary and delusive, for we have never enjoyed any of those stipulations in the act to the amount of any value. The valuable part of the act to us was the franchise giving the company the right to maintain and operate lines in all the States and Territories of the United States, any State law to the contrary notwithstanding. That gave a security and value to our corporation.

Q. Will you please state if, prior to July 27, the date of that letter to the Postmaster General wherein you speak of the great privileges and benefits derived by this company of 1866 as purely imaginary, you had any personal conference with the Postmaster General on the subject?

A. I do not remember when my first conference was with him; but if I did not have personal conference I had conference through our superintendent of the press service, whom I sent down to see him.

Q. What is the name of the officer?

A. Mr. W. B. Sommerville.

Q. Did he make any written report to you of his doings in this connection?

A. No, sir.

Q. Have you any official correspondence with the Postmaster General prior to July 27, 1880, indicating that any distinction was made between the advantages accruing to the Western Union Telegraph Company generally from the exercise of its alleged franchise under the act of 1866 and the material advantages accruing from the right to take certain timber and stone from the public domain?

A. I was certainly of the impression that I had a letter from him prior to that date, but I do not find it in this pamphlet. I see in his letter here of August 2d that he dilates at great length upon it, not only upon the material and rights given the company directly by the Government, but upon what he considered the law gave the company—the right to take or appropriate from other parties. My letter of July 27 was certainly predicated upon the Postmaster
176 General's claim that the telegraph service for the Government had been largely paid for in other ways than by the rates he proposed to fix, and especially in the grants of the act of 1866. How it came to me that he took that ground I cannot definitely recall. I had seen and talked with General Dudley, who was then very close to the Postmaster General.

Q. Was he an officer of the Department?

A. No; he was not an officer of the Department, but he was an adviser of the Postmaster General and on very intimate relations with Mr. Clarkson, Assistant Postmaster General; and whilst telling me that he did not approve of the position the Postmaster General had taken he elaborated the ground upon which he predicated it. Upon this suggestion Mr. Somerville went down there and had a long talk with the Postmaster General, and in that conversation these great benefits of the act of 1865 to the telegraph company were further elaborated. As you will observe, in subsequent letters of the Postmaster General it was claimed that that act gave us absolute right on all the railroads and specified the elevated railway in the city of New York. I have never claimed for the act of 1866 that it gave us any right to plant our poles or establish our lines except on Government lands, but if we acquired the right to plant them from the owners of the land, then the act of 1866 gave us the right to maintain and operate them as against any other authority.

Q. You were aware, were you not, of the fact that the Postmaster General claimed broadly that the company derived great advantages from the act of 1865, at the time you wrote your letter of July 27, this year, and was it not in answer to that broad claim that the company should do something in return for said privileges that you used the question which has been quoted?

A. Yes, sir; it was in answer to the broad claim of the Postmaster General claiming that the act of 1866 gave us a great deal more than it ever did give us and something of what I supposed
177 it could not give us if it had attempted; as, for instance, the

right of way on a railroad or post roads. It was the Postmaster General's belief that it gave us the right to establish our line on the railroads. I not only did not believe that it did do that, but I do not believe that Congress had the power to give us that right. That franchise, however, does exist in a very large number of States by State laws giving to any telegraph company a right of way on a railroad, but I do not think that the right of eminent domain — in Congress to that extent. I do not think the right of eminent domain exists in the General Government to the extent of being able to authorize the taking of any lands or properties within a State.

Q. As your letter of July 27, 1889, is claimed to be predicated upon something which had gone before, I will ask you if the following are not all the correspondence between you and the Postmaster General on the subject prior to that date:

POST OFFICE DEPARTMENT,
OFFICE OF THE POSTMASTER GENERAL,
WASHINGTON, D. C., *June* 29, 1889.

GENTLEMEN: I beg to inform you that, in view of the large amount of official telegraph business given to your company by the executive and other departments of the Government, I desire, in the exercise of my duty under the law of fixing rates for the ensuing fiscal year, to establish reduced rates for that year, and accordingly I have to notify you that the uniform rate for the fiscal year beginning July 1, 1889, and ending June 30, 1890, will be one mill a word, irrespective of distance, for all messages, day or night.

Very respectfully, JOHN WANAMAKER,
Postmaster General.

The Western Union Telegraph Company of New York.

178 POST OFFICE DEPARTMENT,
OFFICE OF THE POSTMASTER GENERAL,
WASHINGTON, *July* 3, 1889.

SIR: I have to acknowledge the receipt of your letter of the 2d instant, and to inform you in reply that in compliance with your request the official promulgation to the other Departments of the Government of the order fixing telegraph rates for the ensuing fiscal year will be suspended a reasonable time to afford your company and any others desiring it an opportunity to be heard.

Very respectfully, JOHN WANAMAKER,
Postmaster General.

Hon. Norvin Green, president Western Union Telegraph Company, New York, N. Y.

POST OFFICE DEPARTMENT,
OFFICE OF THE POSTMASTER GENERAL,
WASHINGTON, D. C., *July* 13, 1889.

DEAR SIR: Referring again to your courteous letter of the 11th on the subject of rates for Government telegraphs for the ensuing

fiscal year, I desire to say that the rate proposed was upon information furnished to this Department that your company has been making rates to various large corporations that are in some instances as low as the figure now proposed for the Government service. With the notice of this fact I would not be justified in making for the Government a new contract at higher rates than were charged other patrons, especially so in view of the privileges and benefits extended to your company by acts of Congress.

179 I submit to your own sense of right that the Government, under existing conditions, is entitled to the minimum rate.

Very respectfully, JOHN WANAMAKER,
Postmaster General.

Hon. Norvin Green, president Western Union Telegraph Company, 195 Broadway, New York, N. Y.

A. It is impossible for me to swear that these are all the letters, although I assume that they are all the letters, but they are not all the communications that passed between us through our representatives, if not in direct conversation. I cannot recall whether it was before or after the 27th of July that I first saw Mr. Wanamaker myself. I had a number of conversations with him, both at Saratoga and in Washington; but General Dudley came here to talk over the matter with me and to tell me what the Postmaster General claimed, and Mr. Somerville went to Washington upon my direction and talked it over with the Postmaster General. From one or both of those sources I was first made aware of Mr. Wanamaker's broad claims of the benefits derived by the telegraph company from that act of 1866, which he subsequently put in writing in his letter of August 2. I think by the time he wrote his letter of August 2d his views had got somewhat modified, because he had gotten from our side informally and by conversations that we did not consider the act conferred upon us the rights and powers that he alleged. Certainly I never should have referred to taking stone and timber and lands if I had not heard of his claiming that we had done so.

Q. What is General Dudley's full name?
A. General W. W. Dudley.
Q. Where is he located?
A. Washington.
Q. Mr. Somerville's full name is W. B.?
A. Yes, sir.
Q. Where is he?
A. He is in the building here.

180 Q. I will ask you if you are in possession of any further correspondence with the Postmaster General prior to said July 27th, 1889, to produce them that they may be considered herein.

A. I cannot tell what he has got here from memory. I will have to find out first.

Q. Have you any other explanation to make as to the use of the

expression referred to in the letter of July 27 beyond what you have already given?

A. No, sir.

Counsel for the telegraph company offers in evidence a letter from the Postmaster General to Doctor Norvin Green, president of the Western Union Telegraph Company, dated August 2d, 1889, of which there is a copy at page 79 of the Annual Report of the Postmaster General for the year ending June, 1889.

It is conceded, without proof thereof, that a letter of the date referred to, of which the counsel has sufficient copy, was in fact written by the Postmaster General to and received by Doctor Norvin Green, but counsel for the Commonwealth objects to the admission of said letter as competent evidence on the ground that it is irrelevant and not a recital or declaration which can be received as evidence to affect the question herein involved.

The following is a copy of the letter:

POST OFFICE DEPARTMENT,
OFFICE OF POSTMASTER GENERAL,
WASHINGTON, D. C., *August* 2, 1889.

DEAR SIR: Referring to your letters of July 11, 16, and 27, which have been given to the public press through channels other than this Department, and in which you protest against any new rate for Government telegrams and offer various arguments to prove that the old rate of one cent a word is as low as your company can accept without loss, I beg leave to say:

181 First. Your unqualified statement that "the privileges and benefits derived by your company through the acts of Congress are purely imaginary" and the companion assertion that your company has never "taken a stone or stick of timber or appropriated a foot of land belonging to the Government" under such acts are not sustained by the facts. It is an undeniable fact that the telegraph companies in accepting the act of 1866 and afterwards the supplementary acts considered they were gaining special and actual benefits which fully compensated them for the low rates intended to be granted to the Government, and the representatives of the Government likewise supposed that they were securing some benefits for the valuable concessions being made to the telegraph companies. The telegraph companies not only accepted the acts expecting substantial benefits would ensue, but in the case of the Western Union Telegraph Company notably great and conspicuous benefits have already accrued. Under these grants the company has claimed the right to use, without compensation of any kind as to right of way, all the highways of the country on the ground of their being post roads. It has broadened this claim to the extent that the streets of cities and towns are also post roads, and therefore open and free to its occupancy and use. The courts have sustained it in this claim. You are necessarily familiar with the Pensacola case, in which the Supreme Court of the United States decided that the Western Union Telegraph Company had rights which

even the sovereign State of Florida could not annul. Thus, under the benefits of this act, instead of not occupying a foot of public land, as you assert, you are, in fact, occupying many thousands of miles of post roads and are privileged to occupy all the highways in the United States. You have thus been able to occupy and use the streets in the large cities of Philadelphia and New York regardless of the views of the local authorities, and almost regardless of public opinion. Even the elevated railroads in New York city have been claimed as post roads and the claim sustained. The State of New York may regulate in the use, but is not able to deprive
182 you of these great privileges secured to telegraph companies and maintained to them alone by the congressional act of 1866. Beyond this the streets of all other cities and towns of the United States have been kept open to your use. I am sure that, upon reflection, you will hardly claim that such great benefits as these are "purely imaginary."

In other respects your company and other telegraph companies have secured substantial benefits from the Government and from the public under acts of Congress, but these I have mentioned are enough, I think, to sustain my former reference to the privileges and benefits given to you by the Government, the value of which, in my judgment, is beyond calculation. Conferring such great privileges and benefits upon you, the Government, in my belief, expected and is entitled to receive not simply your exceptionally low rates to others, but even a lower special rate.

Second. As to your question of the legal power of the Postmaster General to fix the rate for Government messages, I would only remark that such right appears to have been understood by the previous Postmaster General as an official duty, and their exercise of the duty has been generally and constantly accepted and respected by the telegraph companies. In any event, I should say we may agree that the act of Congress at least imposes on the Postmaster General the duty to name the rate and maintain it until in a court of inquiry the rate has been shown to be unjust.

Third. As to your qualified statement that no corporations have received a rate equal to the proposed Government rate of one mill a word—

Your statement that the press associations are not corporations is hardly justified by the facts, and is not material to the question. They may not be corporations for general business, but most, if not all, of them are incorporated under the laws of some State, and their dealings with the telegraph company is as a company or corporation, not as individuals. You will not deny—indeed, one of your officials has admitted to me—that some of the press associations get their news reports for a mill a word to each newspaper, and
183 in one association the rate is even lower than that. I do not criticise the press rate; it is not too low. It would be better, in my judgment, for the public, the press, and the telegraph companies if it were still lower. As to the associated press, there is force in your statement that it is a wholesale rate, as it were, for the same dispatch, sent over the same wire at the same time to several

customers, but is it not true that the rates given to some portions of the press effectively contradict your own statement that "for messages transmitted to a single address the Government is our only customer enjoying reduced rates?" By this I presume you mean that the Government has the lowest rate given to any single customer, its lowest rate being 1 cent a word for day messages and three-fourths of a cent for night messages; but this charge is made not only upon the message itself, but upon the address and signature as well, so that for ten words in a message and ten words in the address and signature the above rate is, in fact, 2 cents per word in the day-time and 1½ cents per word at night. Is it not true that the large papers of New York, Chicago, and other large cities have a half-cent rate for their special dispatches in day-time and a fourth of a cent at night, or a rate of one-half lower than the Government has been granted? Is it not true, also, that this patronage from the enterprising press is the most profitable that you have, and that it would, in fact, give you still more profit if made still lower? Reduced rates bring increased business and enlarged profit. Your own testimony before committees of Congress at various times has been steadily to the effect that every time your company has reduced prices it has gained increased income. This accords with my own view that a constantly decreasing rate, where there are large numbers of customers, will both better serve the public and better profit any business. I believe that the new rate proposed for the Government would not materially alter the amount of cash received by you, while the Government would be enabled to greatly quicken and vitalize the transaction of its business in all departments.

184 It is quite true, as you say, that the Government is able to pay proper rates, and I may add that, so far as I know, is willing to pay just rates, and that it is farthest from my thought that "the people" should suffer by reason of the losses you claim that you are now making and would still further make on Government business. I am satisfied that the people could and should have much lower rates than now exist, and that neither the people nor the Government should suffer because specially low rates are given to the favored customers.

While claiming that the Government has received the lowest single-address rate, you not only admit a lower rate to the press, but also plainly say that certain railroads or transportation companies are given "half commercial rates." When it is considered that in Government messages all the words are counted, the address and signature as well as the message, and in all other telegrams the message only is counted, is it not true that this half rate to such companies is at least as low as the Government rate, and in some instances lower? For instance, a Government message from Washington to New York, containing twenty words in the message and ten words in the address and signature, would be charged at 30 cents, which is nearly 50 per cent. more than the transportation companies would pay for the same message. I am not speaking now, and do not wish to have confused with this

part of the discussion, the free service you give to railroads for certain free service to you. These payments I understand to be for rights of way, etc. More than that, I am informed your company in many cases actually pays large sums of money to railroads for rights of way, and it does not seem unreasonable to suppose that it would not be out of place for the telegraph companies to be expected to make compensation of some kind to the Government for its much larger concessions, which, in effect, have secured to you the enjoyment, particularly cities and towns, of much more valuable rights of way.

Fourth. As to your statement that no message can be carried and delivered by a telegraph company for less than 20
185 cents without the service being done at a loss, the cost of telegraphic service appears to be a very difficult thing to ascertain definitely. Perhaps in establishing the proper rates for the Government to pay, this subject may best be referred to a commission to ascertain the facts. In one of your letters you put the average cost of the message to the company in receiving, carrying, and delivering at 23.2 cents. In this cost do you not include large sums paid for rentals of leased lines, some of which are not now in use, but only valuable to you in removing competition, rights of way on railroads, and other accounts, which are obviously chargeable to capital account, and not to operating expenses? Is it not true that within a few years, and for several years in succession, large volumes of business have been handled by your company and other companies at a minimum rate of 10 cents a message, and did not this rate continue until the Western Union absorbed the competing lines? The table of statistics given in your memorial to the Senate committee in 1888 shows that during the period of the 10-cent. rate your company did not lose money, but made large profits. If this were possible then, and especially as your business has grown very largely in volume since, it would seem that it might be practicable now.

I understand that the signal service reports make up a very large proportion of the entire amount of Government telegraphic business. Your schedule shows that for eleven years the Government has been paying about three cents a word for each circuit over which Government messages are transmitted. No reduction whatever has been made in that rate since 1877, but within that period you have reduced the public rate from 62½ cents to 30 cents per message, more than 50 per cent. reduction, and the cost of handling telegrams has been reduced during the same period from 43.4 cents to 23.2 cents per message, or over 46 per cent. reduction. Within the past five years the public rate has fallen 18 per cent. and the cost of transmission about 8 per cent., but within that period
186 there has been no reduction whatever in the Government rates.

Taking all these facts into account, I believe that the Government has been paying for its telegraphic service more than any other customer giving you a like or approximate amount of business, and that within the period first named there has not been so great a reduc-

tion in the Government rates as to the general public and the press. Waiving entirely the question of benefits accruing to the telegraphic companies under the act of 1866, the Government ought to be put upon as favorable a basis as to telegraphic rates as your most favored customers.

Inasmuch as this discussion has taken a wider range than I anticipated, it may be proper to add, referring to your letter, that you are right in saying that the acceptance by telegraph companies of the act of 1866 "rendered it to all intents and purposes a compact between the Government and telegraph companies;" but I do not agree with all of your next succeeding statements; for instance, the printed copy of your memorial presented to the Senate Post Office Committee last year misquotes the act of 1866, which should read:

"Provided, however, That the United States may at any time purchase all the telegraphic lines, property, and effects of any or all companies acting under the provisions of the act of July 24, 1866."

The words "any" and "or" are omitted in your memorial. This omission was, of course, an error, but as your present correspondence expresses the same meaning, I mention the matter merely to remark that your views in that particular are not adopted by this Department. The act of 1866 was, as you say, a compromise measure in which the United States, for the time being, waived its inherent right to the performance of a telegraphic service in conjunction with the post office. The first telegraph line in this country was built with Government aid, and that the Government did not continue
to exercise its undoubted prerogatives by extending and op-
187 erating the telegraph as a more speedy means of communication than the post was, as is well known, purely an accident.

I have given full and respectful consideration to your protest, weighed your arguments, and investigated the subject for myself through such channels as are open to me, desiring only to protect the interests of the Government.

In conclusion, I beg to remind you that in my letter of July 13, in answer to yours protesting against the reduction, I consented to your request for conference on the subject before any official order to the departments fixing the rate should be issued, and I am yet quite willing to entertain any reasonable proposition based upon the known facts.

I have the honor to remain, very respectfully, yours,

JOHN WANAMAKER,
Postmaster General.

Mr. Norvin Green, president Western Union Telegraph Company, New York.

Counsel for the Commonwealth further offers said letters of Dr. Green as declarations of an officer of the Western Union Telegraph Company bearing upon a matter at issue between the parties herein.

Counsel for the Western Union Telegraph Company objects to the introduction of the said letters upon said ground, on the ground of irrelevancy and incompetency.

NORVIN GREEN.

Subscribed and sworn to before me this 17th day of December, 1889.

WM. J. HARDING,
Notary Public, New York and Kings Counties,
State of New York, Special Examiner.

188 The plaintiff offers in evidence, subject to defendant's objection as to competency, the following statement showing the relative mileage of wires and line of the company, namely:

1886.

Total mileage of wire, 1886	448,960
" " line, "	151,656
Mileage in Massachusetts, wire, 1886	12,491
" " line, "	2,919
Showing average wires on total line	2.96
" " line in Mass.	4.27

1887.

Total mileage of wire, 1887	516,097
" " line, "	153,810
Miles of wire in Massachusetts, 1887	12,605
" line " " "	2,907
Showing average wires on total line	3.36
" " line in Mass.	4.33

1888.

Total mileage of wire, 1888	614,324
" " line, "	170,288
Total miles of wire in Massachusetts	14,554
Total miles of line	3,026
Showing average wires on total line	3.19
" " line in Mass.	4.80

Defendant objects to the above as incompetent, but offers *de bene* the whole of the table marked "G," to which reference may be made.

All of which is respectfully submitted.

Dated December 27th, 1889.

FRANCIS S. FISKE,
Special Examiner.

(26744.) Dec. 30, '89.—50.

189 *Clerk's Certificate.*

UNITED STATES OF AMERICA, } ss:
Massachusetts District, }

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the

foregoing are true copies of the records in three cases in equity entitled No. 2553, Attorney General of Commonwealth of Massachusetts, by information, complainant, *v.* Western Union Telegraph Company, defendant (tax of 1886); No. 2554, Same *v.* Same (tax of 1887); No. 2629, Same *v.* Same (tax of 1888), lately determined in said circuit court, and of all proceedings therein.

Seal of the Circuit Court, Massachusetts.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this twenty-eighth day of February, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

JOHN G. STETSON, *Clerk.*

190 *Appeal Bond.*

Circuit Court of the United States, District of Massachusetts. In Equity.

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, by Information, Complainant,
v.
THE WESTERN UNION TELEGRAPH COMPANY, Defendant. } No. 2553.

(Tax of 1886.)

SAME
v.
SAME. } No. 2554.

(Tax of 1887.)

SAME
v.
SAME. } No. 2629.

(Tax of 1888.)

Know all men by these presents that we, The Western Union Telegraph Company, a corporation of the State of New York, principal obligor, and W. C. Humstone and Charles A. Tinker, of the city of New York, sureties, are held and firmly bound unto the Commonwealth of Massachusetts in the sum of twenty-five thousand dollars, to be paid to the said Commonwealth of Massachusetts or its assigns; to which payment, well and truly to be made, the said principal obligor and the said sureties bind themselves, their successors, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with the corporate seal of the said principal obligor
191 and the seals of said sureties and dated this twenty-first day of February, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a circuit court of the United States for the district of Massachusetts, in the three several suits in equity above entitled depending in said court between The Attorney General of the Commonwealth of Massachusetts *ex rel.*, &c., against The Western Union Telegraph Company, final decrees were rendered in each of said suits respectively against the said The Western Union Telegraph Company, and the said The Western Union Telegraph Company having taken an appeal from each of said final decrees respectively to the Supreme Court of the United States to reverse said final decrees and each of them in the three aforesaid suits in equity, which said appeals and each of them were duly allowed:

Now, therefore, the condition of the above obligation is such that if the said The Western Union Telegraph Company shall prosecute its said appeals and each thereof to effect and answer all damages and costs if the said The Western Union Telegraph Company fails to make its said appeals good, then and in that event the above obligation to be void; else to remain in full force and virtue.

THE WESTERN UNION TELEGRAPH COMPANY, [L. S.]
By NORVIN GREEN, *President.*
W. C. HUMSTONE. [L. S.]
CHAS. A. TINKER. [L. S.]

Attest: A. R. BREWER, *Secretary.*

Sealed and delivered in the presence of—
WM. J. HARDING.

Bond approved.

LE BARON B. COLT,
Circuit Judge.

192 A true copy of the bond taken by the judge at the time of allowing the appeal named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

Endorsed on cover: Massachusetts C. C. U. S. No. 1578: The Attorney General of the Commonwealth of Massachusetts, appellant, *vs.* The Western Union Telegraph Company. No. 1579: The Western Union Telegraph Company, appellant, *vs.* The Attorney General of the Commonwealth of Massachusetts. No. 1580: The Attorney General of the Commonwealth of Massachusetts, appellant, *vs.* The Western Union Telegraph Company. No. 1581: The Western Union Telegraph Company, appellant, *vs.* The Attorney General of the Commonwealth of Massachusetts. No. 1582: The Attorney General of the Commonwealth of Massachusetts, appellant, *vs.* The Western Union Telegraph Company. No. 1583: The Western Union Telegraph Company, appellant, *vs.* The Attorney General of the Commonwealth of Massachusetts. Filed March 3, 1890.

FILED,
OCT 25 1890
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

Nos. 1126-1131. (3 Cases with Cross Appeals.)

ATTORNEY-GENERAL OF THE STATE OF MASSACHUSETTS, BY INFORMATION, AT THE RELATION OF THE TREASURER, IN EQUITY,

v.

THE WESTERN UNION TELEGRAPH COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF ON BEHALF OF THE COMMONWEALTH OF MASSACHUSETTS.

ANDREW J. WATERMAN, Attorney-General,
HENRY C. BLISS, Assistant Attorney-General,
for the Commonwealth.

Supreme Court of the United States.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Nos. 1126-1131.

ATTORNEY-GENERAL OF THE STATE OF MASSACHUSETTS, BY INFORMATION, AT THE RELATION OF THE TREASURER IN EQUITY,

v.

THE WESTERN UNION TELEGRAPH COMPANY, *Appellant.*

(3 CASES WITH CROSS APPEALS.)

October Term, 1890.

BRIEF FOR THE COMMONWEALTH.

I.

The defendant is a corporation erected by the State of New York, and exercising its franchise within the State of Massachusetts. Here it receives the protection of our laws for the security of its property and the peaceful exercise of its corporate rights; it, therefore, as a fundamental principle, owes to this State a reasonable contribution by way of an excise or tax.

To determine the amount of this contribution, the Commonwealth ascertains the market value of all the shares of the capital stock of the company, the proportionate length of line within the State compared with its whole mileage, and then, assuming that such a proportion of its capital is represented

in Massachusetts as corresponds to its proportionate length of line within the State, assesses upon such valuation an exaction at the uniform rate of taxation. The Commonwealth assumes upon such computation that the company has a certain amount of taxable property in this State, and a franchise, the value of which may reasonably be determined in the manner aforesaid, and then assesses upon it a tax or an excise as it does upon all other property and franchises within the State. There is no claim of any discrimination against this or any other foreign corporation as to the rate or mode of assessment, except in the unimportant matter of the real estate held in New York, which question in its present form has been passed upon by this Court. (For State Statute see Appendix A.)

THE MAIN PROPOSITION.

These cases involve the taxes for the years 1886, 1887 and 1888, and the same question that was determined in Attorney-General of Massachusetts *v.* Western Union Telegraph Company, 125 U. S. 530. In the previous case the Court held that the exaction was "essentially an excise upon the capital stock of the corporation." The excise is *pro tanto* in lieu of a common property tax, and, being upon the total value of the stock, or upon the portion of the capital of the corporation within the State, it, of course, includes all tangible property. Such valuation is made the equitable measure of assessment; but the State is not limited by the value of a distinct element of the measure. The evidence offered by the company as to the value of property in Massachusetts was therefore irrelevant.

The Western Union Telegraph Company again claims an exemption herein under the provisions of the act of 1866. This act provides that any telegraph company organized under the laws of any State shall have a right to construct and maintain and operate lines of telegraph through and

over any portion of the public domain of the United States over and along any of the military or post roads of the United States, which have been or may hereafter be declared such by act of Congress, and over, under or across the navigable streams of waters of the United States, *provided*, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stones, timber and other materials for its posts, piers, stations and other needful use in the construction, maintenance and operation of said lines of telegraph, and may preëmpt and use such portions of the unoccupied public lands subject to preëmption through which its said lines of telegraph may be located as may be necessary for its station, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

Section 2 provides that the United States shall have preference in the transmission of messages, and that the rate shall be annually fixed by the postmaster-general. Section 3 provides that said rights and privileges shall not be transferable, and that the United States may acquire the property at an appraisal thereof. Section 4 provides for the acceptance of said act by telegraph companies.

The Western Union Telegraph Company, prior to 1866, by absorption and consolidation, had acquired the control of other companies and concerns having franchises, or doing telegraph business, in nearly every State and territory of the Union. (Record 61.) It is common knowledge that, at that date, the transmission of intelligence by electricity was a common feature of commerce throughout the entire federal domain. The inception and existence, therefore, of the business, was independent of the act of 1866. It also appears that, except in the single case of Florida, no State had attempted by direct legislation to exclude a foreign company.

The Western Union Telegraph Company, according to the statement of President Green (Record 106), has never derived any substantial advantage from its right to take timber, poles and material from the public domain. The United States government practically owns no property in the States. The company, before it can plant its poles on the common ways and thoroughfares, must acquire the property right so to do of private owners and the local governments. When it has so acquired such rights, and is exercising them in the transmission of intelligence, *it has protection for its existence under the constitution, and without the aid of the act of 1866.*

The act of 1866, therefore, though it may have operated as a permission, did not grant to the company anything in the nature of a franchise, and of course the act did not, as such, enhance the value of the stock according to which the exaction was assessed.

There were five witnesses called by the company to prove the actual value of the franchise. President Green states, in his communication to the postmaster-general (Record, p. 106), "as to the great privileges and benefits derived by this company from the act of 1866, they are purely imaginary."

Witness Kirk (Record 70) bases his valuation on the proposition that "the knowledge of the government's sanction of the telegraph lines helped us in our negotiations to reduce the amount necessary to pay." He did not claim practically that it gave the government the absolute right to pass over the ways and post roads.

Mr. Chapman (Record 72) substantially claimed that the act of 1866 was used "argumentatively." He errs in his assumption that the act gave the company a right to cross navigable streams. The act in effect did not do this, for, by the provisions of the act itself, a company is not permitted to cross such waters if it interferes with navigation;

and it is well understood that, unless a party in some way does interfere with navigation, the federal government has no control. The State government, in respect to everything but navigation, controls the bed of the streams and the air above to the same extent that it controls the farms on the shore.

Witness White (Record 82) predicates his valuation substantially on the theory that the act put the government in friendly relations with the company, and in that respect the company was benefited.

Mr. Kirk (Record 95) based his valuations on the erroneous theory that the act of 1866 gave the company the right "to extend its wires without the aid of local authorities."

Mr. Chandler, president of the Postal Telegraph Company, a witness for the Commonwealth, repeats in his testimony the statement previously made to the postmaster-general, "that the Postal Telegraph Company, so far as I know or believe, have never derived the slightest benefit by the acceptance of the act of 1866." (Record 77.)

On the testimony, therefore, it must be held that, even if the arrangement between the government and the company, under the act of 1866, be a franchise, it is not taxed; for we tax the company according to the value of its stock (or that part of the stock representing the amount of business done in Massachusetts); and, if the act of 1866 did not enhance the value of the stock, it is, of course, not included for taxation. Suppose the act of 1866 had resulted in an actual loss to the company, and in lessening the value of the stock, it of course could not be held that it was taxed under our system of assessment.

Had we assessed our exaction according to gross earnings, it might be claimed that in fact we taxed the product of the franchise; but when we tax a valuation which has not been added to by the particular grant, the said grant is not in effect, or in fact, taxed at all. In the case at bar the pre-

sumption of value is controlled by proof. And herein is the distinction between this case and the other cases cited by the company. The decision in Ratterman *v.* Western Union Telegraph Company, 127 U. S. 411–26, cites the previous Massachusetts case simply to show that it is possible and practicable to make a division in respect to the property and income of the company, so as to bring the taxation question without the constitutional objection referred to.

The Commonwealth, however, rests mainly on the broader proposition that the act of 1866, in the language of the Court in the previous case, is only "permissive," and does not grant a franchise within the rule in the old Maryland case.

MINOR PROPOSITIONS.

There are also involved the following other questions: —

On the tax of 1886 the telegraph company paid into court Oct. 25, 1888, the sum of $7,574.47 (Record 11). The decree of the circuit court allowed this sum to be deducted from the amount awarded. The Commonwealth contended, and here contends, that the rule allowing the payment of money into court is not applicable to proceedings brought by a sovereignty for the collection of taxes. A copy of the rule referred to is hereto annexed. (Exhibit B.)

A similar payment was made on the tax of 1887 (Record 23).

On the tax of 1888 (Record 34) the telegraph company attempted to tender to the Commonwealth the sum of $6,947 90. The tender was not allowed in the decree. The Commonwealth contended that the company had made no sufficient tender, and that the company was not entitled to the advantages of a tender in a prerogative exaction for taxes.

The company also contended against the ruling of the

Court that the amount paid into court should be deducted as of the date when the tax became due (allowing interest on the part payment up to the date of payment), and that the balance of the tax should stand at interest for the uninterrupted period of the default. The Commonwealth contends that the rule allowing the payment of money into court was adopted merely to give the defendant the right to extinguish the claim, if he should pay enough, and otherwise a right to make a part payment, and that the rule respecting part payments and payments on account should apply; that is, that interest should be computed on the whole sum up to the date of payment, the part payment then deducted, and interest computed forward on the balance

The Court allowed interest at the rate of twelve per cent. up to the date of the decree, and interest thereafter at six per cent. The Commonwealth contends that the statute rate (section 54, chapter 13 of Public Statutes) should be computed up to the date of actual payment, or until the taxes "are paid." If it be held that the statute rate runs only to the date of the decree, the Commonwealth contends that the decree in contemplation is the final decree on the mandate of this Court, and not the original decree which was vacated by the appeal. There are, therefore, these several propositions: —

First. Has a tax payer, in a proceeding against him to enforce payment, a right to the benefit of the rule allowing the payment of money into court?

Second. If the party is so entitled to the benefit of the rule, should the amount paid be deducted from the original amount as of the date when it became due, with interest thereon to the date of payment, and interest on the balance computed for the period of the default, or, should interest be computed according to the usual rule applicable to part payments or payments on account?

Third. Is the State entitled to a decree allowing twelve per cent. interest up to the date of payment of the decree?

Fourth. If the State is entitled to twelve per cent. only to the date of the decree, which decree is contemplated, the original decree, or the decree on the mandate of this Court?

II.

It must be admitted, under the decision in Commonwealth *v.* Lancaster Savings Bank, 123 Mass. 495, and in Attorney-General *v.* Western Union Telegraph Company, 125 U. S. 530, and in numerous other cases, that the State has a right to assess a franchise tax on a foreign corporation doing business and exercising its franchise within the State.

Under Bank of Commerce *v.* New York, 2 Black, 20, a sovereignty has a right to adopt any standard of measurement, and may follow its caprice even in this respect.

> See also Delaware R.R. Tax case, 18 Wall. 206, 225. State Tax on Railway and Gross Receipts, 15 Wall. 284–293.

The Court say, in the case of the Bank of Commerce, *ubi supra:* "The Court cannot sit in judgment upon the question of whether the Legislature has exercised its taxing powers wisely or unwisely over objects within its discretion. There is always considerable latitude of discretion in every government in the exercise of its taxing power, both as to objects and the amount of discrimination in respect to both."

Assuming now that the defendant is exercising its ordinary corporate powers and functions within Massachusetts, it is not sufficient for the defendant to claim, in opposition to franchise tax, that within the standard of measurements is an item of property which of itself could not be the object of a separate tax, for there is no rule to the effect that that which is used to measure a franchise tax must itself be subject to taxation. This point was distinctly covered by the

decision of the Court in Commonwealth *v.* Hamilton Manufacturing Co., 12 Allen, 298, 6 Wall. 632, wherein it was held that the fact that certain government bonds which were themselves exempt from taxation were included in the value of the stock of the institution according to which an excise was exacted, did not affect the validity of the assessment.

See also Woodruff *v.* Parham, 8 Wall. 123.
Manufacturers' Ins. Co. *v.* Loud, 99 Mass. 146.

It, however, is not necessary for the Commonwealth herein to carry the proposition so far as to claim a right to measure a State franchise tax by a valuation largely made up of privileges derived from a federal grant, because in the case at bar the defendant is not enjoying in this State, or elsewhere, any federal franchise *which has substantially added to the value of the capital stock according to which the tax is assessed.*

Observe that the common immunities and rights of all citizens and persons are not franchises which have a money value, if they may be called franchises in any sense. The constitution guarantees to all citizens certain rights, such as freedom of speech, right of property, freedom of commerce through States, save only the power in Congress to regulate it; but a citizen who is exercising his calling under these common rights cannot be said to have an individual property therein. If the party be a corporation having a capital divided into shares, it cannot be said that the common constitutional rights and immunities have entered into the value of such shares, simply because the corporation has exercised its powers under and in pursuance thereof. If the sovereignty has conferred on any particular party a special prerogative right beyond what others enjoy, then, by relation, such special privileges may have a particular value; but the abstract right of unmolested interstate commerce does not enhance the value of the capital stock of any corporation,

for it is a common right, free to all. When, therefore, the State assessed an excise on the value of the stock of the Western Union Telegraph Company, it did not in any sense, remotely or otherwise, assess a tax on its right to do interstate business; for that right is absolutely free, so far as the States are concerned, and free so far as discrimination is concerned, under the federal law, and therefore without value or price to be included in any computation.

Had the State assessed a tax on receipts of interstate business, as such moneys came in, it might be said that it had directly impeded the exercise of the right referred to. Such a proceeding might be said to be equivalent to putting a price upon a privilege which is free, and then taxing it accordingly. And the case would fall under the rule in the Gloucester Ferry Company *v.* Philadelphia, 114 U. S. 196, and the case of the Philadelphia Steamship Company, 122 U. S. 342.

But the material product of interstate business, when it becomes common property and mingled with the general wealth of the State, is unquestionably subject to taxation.

See Gross Receipt case, 15 U. S. 2943, wherein the Court say: "No doubt every tax upon personal property, or upon occupations, business or franchises, affects more or less the subjects and operations of commerce; yet it is not everything that affects commerce that amounts to a regulation of it within the meaning of the constitution. We think it may safely be asserted that the States have authority to tax the estate real and personal of all their corporations, including carrying companies, precisely as they may tax similar property when belonging to natural persons and to the same extent. A power to tax to this extent may be essential to the healthy existence of the State government; and the federal constitution ought not to be so construed as to impair, much less destroy, anything that is necessary to their sufficient existence." In Philadelphia Steamship Com-

pany *v.* Penn., 122 U. S. 341, in which the case just cited is reviewed, the Court say: "Goods when mingled with the general mass of property in the State are taxed in the same manner as other property possessed by its citizens, without discrimination or partiality." The Court held in Welton *v.* Missouri, 91 U. S. 275, that "Goods brought into a State for sale cannot be taxed by reason of their being brought into the State, or because they are products of another State." These circumstances, however, would not exempt them from the ordinary liability to taxation of common property within the State. In the Philadelphia case the Court further say (122 U. S. 342): "No doubt a ship owner, like any other citizen, may be personally taxed for the amount of his property or estate without regard to the source from whence it was derived, whether from commerce or banking or any other employment." This, however, the Court add, is "entirely different from laying a special tax upon his receipts in a particular employment;" or, as previously stated, not on the receipts "because they are money, but because they were received for transportation."

This substantially disposes of the defendant's contention on the interstate question. The State has not assumed to give to these privileges a value. It has levied a tax according to the value of its capital stock represented in Massachusetts, and the right of commerce is no more involved in such valuation than it is involved in the value of corn in Illinois, the value of which is dependent on the right of unobstructed transportation to the seaboard. Following this theory to the case, as presented on the evidence, it will be seen that the defendant is in substantially the same position in its contention under the act of 1866.

Suppose the Commonwealth in levying its tax had correctly assumed that the value of the rights of the company under said act was one million dollars, and had deducted that amount from the value of the capital stock: of course

the defendant would have had no ground for complaint herein; and it equally has none under its own claim, unless the act of 1866 has substantially added to the value of the capital stock. A right without a value is of course not taxed in the valuation of a commodity into which it among other things has or might have entered.

The old ferry franchise had a certain value by the exclusion of other corporations from the vicinity of its location, and such corporation thereby had a certain appreciable value which might be bought and sold as any other commodity. But has the Western Union any such franchise of appreciable value derived from the federal government that it could sell on the streets to-morrow for a dollar? The party solicited to buy could obtain from the federal government all of that particular commodity that the Western Union Company has to sell, for the mere asking. It, in fact, has as a birthright under the constitution all that the Western Union possesses of the rights referred to, without the asking.

III.

Observe the character of the alleged privileges under the act of 1866 in view of the decision in the Pensacola case, 96 U. S. The act of 1866 was only incidentally referred to in the decision in that case, and the decision is not predicated upon it, but on the constitutional question respecting *interstate commerce*. And this becomes more apparent when that case is compared with those of more recent date. Prior to the act of 1866 (see testimony of Dr. Green) telegraph companies had extended their network of wires over the entire inhabited country, and by absorptions and consolidations had brought under one system and control a large number of the telegraph lines of the land, and since that date, with few exceptions, have practically absorbed them all. Now, it is not claimed that the act of 1866 gave a right of way. Except as the company could

use the act of 1866 "argumentatively," the company has nothing under that act that it did not have under the constitution as an agent of interstate commerce. The act of 1866 did not constitute the telegraph company an agent or instrument of interstate commerce. It was such by the inherent character of its business. The federal government did not then adopt it as an agent for the performance of its functions. It has been adopted by the government since the first message was attempted to be sent by the secretary of the navy.

In the Texas Telegraph case, 105 U. S. 160, the same rule is recognized as in the Pensacola case. Add, now, to these decisions, the rule in the Wabash case, 118 U. S. 557, and the Philadelphia Steamship case, 122 U. S. 326, and the case of Robbins *v.* Shelby Taxing District, 120 U. S. 489, wherein it is held that, before any action is taken by Congress, States are without power to interfere with interstate commerce, and that the "failure by Congress to make express regulations indicates that its will is that the subject shall be left free from restriction," and every right claimed herein under the act of 1866 is recognized as existing under the constitution. Observe that it is not claimed that the company has derived any value from its right to take timber and stones from the public land; and, if it has such a right, the same is not in the nature of a franchise, but arises from a contract.

It is true that the decision in the Sub-Way case in New York City recites at length the act of 1866, but not necessarily as a basis for the conclusion. Under the decision in the Pensacola case, upon which the New York case is predicated, if the company had acquired the right of way over the railway structures, they could not be interfered with, except under a police measure; and the right in the city to regulate the service to that extent is not denied by the learned judge in that case.

We therefore come back to the first proposition, that, from the evidence and a fair interpretation of the law, the money value of the stock of the Western Union Telegraph Company has not been enhanced by the act of 1866.

IV.

Observe the testimony of Norvin Green, president of the Western Union Telegraph Company. Prior to 1866 the Western Union Company, by consolidation and absorptions, had extended its system over the whole country. These lines of course had been constructed without the aid of the act of 1866. States had legislated freely in aid of these messengers of intelligence; and it will be found, I think, that within every State provision had been made for the construction of telegraph lines over the highways. Except in a single county of Florida there had been no attempt to obstruct the extension of the system of wires. The companies had, in fact, been encouraged by the people of the State to extend to them the benefits of the service. The following is an extract from the testimony of Mr. Green: —

×Q. Is it not true that the extension of your service has been received with approval by the communities into which your lines have gone?

A. No doubt about it. The communities are always glad to have a telegraph line extended to them, and when they get them they are just as glad to have an opposition line there

×Q. Except in the two counties in Florida, has any State or territory attempted to exclude your company by legislation from extending its wires?

A. I think not.

In view of the recognition in the telegraph companies of rights to do interstate business under the federal constitution, independent of the act of 1866, and of the experience of the company as detailed by the president, could we have expected a different declaration from the president than that

contained in his letter to the postmaster-general, wherein he says, "As to the great privileges and benefits derived by the company from the act of 1866, they are purely imaginary"? The explanation given by the witness does not control this serious declaration of the principal officer of the company to the head of the post-office department on a matter directly in controversy between them.

The other witnesses, on a false assumption as to the actual rights conferred by the act of 1866, imputed thereto a value. But the basis of valuation was wrong, according to the admissions of the defendant itself. The witnesses have simply assessed the wrong property. It is dealing with trifles to assert that the friendly relation of the government, evidenced by the act of 1866 and the acceptance of it by the company, is a franchise. The reference of the witnesses to the possibility of the government's establishing a postal telegraph is a clue to the whole transaction; but a course of treatment by which the government is quieted in a possible disposition to establish a system of its own, or an arrangement under which the government would feel itself, as a matter of fair treatment, bound to acquire the telegraph property of the country at a fair valuation, if it should conclude to add the telegraph to its postal service, is not a franchise.

V.

Independent of these considerations, the tax is valid. It is uniform, and does not discriminate between domestic and foreign corporations, and the case is clearly within the proposition laid down in Osborn *v.* Mobile, 16 Wall. 479: "It is not everything that affects commerce that amounts to a regulation of it within the meaning of the constitution."

Under this proposition is a line of cases which stand uncontrolled by the decision in the Philadelphia Steamship Company case, 122 U. S. 326, overruling the decision in the State tax on Gross Receipts case.

Woodruff *v.* Parham, 8 Wall. 123. This case arose under an ordinance of Mississippi, which levied an exaction upon all sales of merchandise within the State. The Court say, as the tax is uniform on all the sales within it, whether by citizens of that or other States, the tax is valid.

In Hinson *v.* Lott, 8 Wall. 149, the case arose under a law which prescribed a license exaction on dealers in spirituous liquors; held valid. In Munn *v.* Illinois, 94 U. S. 113–135, the Court held that warehouses, though used as instruments of interstate commerce, were subject to be regulated by State legislation. It is said that incidentally they are connected with interstate commerce, but not necessarily so.

In Machine Company *v* Gage, 100 U. S. 676, it was held that "a tax upon all peddlers of sewing machines, without regard to the place of growth or produce of material or of manufacture," was valid. And this case is cited with approval in the Shelby Taxing District case, 100 U. S. 497, which latter case marks the extreme point reached by the superior court on the interstate question.

In Packet Company *v.* St. Louis, 100 U. S. 423, it is held that a municipal corporation owning wharves which it maintains at its own cost is not prohibited from charging or collecting reasonable fees.

In Nathan *v.* State of Louisiana, 8 Howard, 79, the Court held that a law which imposes a tax on exchange and money brokers is not repugnant to the constitutional power of Congress to regulate commerce. Herein the Court say: "No one can claim an exemption from a general tax on his business in the State, on the ground that the products sold may be used in commerce. No State can tax an export or an import as such, except under the limitations of the constitution. But before the article becomes an export, or after it ceases to be an import, by being mingled with other property in the State, it is a subject of taxation by the State. A cotton broker may be required to pay a tax upon his

business, or by way of license, although he may buy and sell cotton for foreign exportation."

In Briscoe *v.* Bank of Commonwealth of Kentucky, 11 Peters, 257, the Court held that a State has power to incorporate a bank, and the banks established have been, without exception, authorized to deal in foreign bills of exchange, and that a State law which imposes a tax on exchange and money brokers is not repugnant to the constitutional power of Congress to regulate commerce. And therein is cited the case of Provident Bank *v.* Billings & Pitman, 4 Peters, 514, wherein the same rule was applied.

In the case of Delaware Railroad Tax, 18 Wall. 207, it is held that an assessment of a tax on a railroad corporation, extending without the State, was valid, against the claim of counsel that it imposed a tax upon property beyond the jurisdiction of the State; that it conflicted with the power of Congress to regulate commerce among the several States, and that it interfered with the right of transit for persons and property from one State into or through another. In that case it was shown that, though about one-fourth of the road was in the State of Delaware, nearly all the shares of stock were owned by persons who were not citizens of that State. Nevertheless, the tax was sustained.

Referring to the objection that the tax was in conflict with the power of Congress to regulate interstate commerce, or the right of transit of persons and property from one State into or through another, the Courts say the tax imposed by the act in question affects commerce just in the same way, and no other, that a tax of any kind necessarily increases the expense attendant upon the possession of the thing taxed; that taxation produces this result of itself constitutes no objection to its constitutionality.

Gloucester Ferry Company *v.* Penn., 114 U. S. 196. In this case the tax was upon the dividend declared by the company; that is, upon a definite part of all its earnings.

The facts in that case show that the company simply touched at a wharf on the shore, and to no other extent exercised its franchise within the State imposing the tax. The Court in this case expressly say that the property of corporations engaged in foreign and interstate commerce, as well as the property of other corporations engaged in other business, is subject to State taxation, providing it is within the jurisdiction of the State. The Court further say: "No doubt the capital stock of the corporation regarded as an inhabitant of the State as other property may be taxed, providing no discrimination be made against them as corporations carrying on interstate commerce so as to make the tax in effect a tax on commerce."

The remoteness of the effect becomes of course a question of importance. There has been no intimation in any decision to vary the rule that the money derived from all sources, when invested or held as other property within the State, may be taxed as an item of property regardless of its origin. The more recent decision in which the State tax on Gross Receipts case is reviewed does not by any means cover the case at bar. When the interstate commerce receipts have become merged with other properties of the company, such property as an entirety may be taxed at their valuation. If the rule were otherwise, an infinite embarrassment and perplexity would be involved in the making an execution of the tax law of the several States.

The State is not limited to tangible property in levying its taxes, as is said in California *v.* Pacific Railroad, 127 U. S. 40, "the State may tax outside visible property in the State." It may measure its excise or tax by the value of the intangible elements of valuation of the capital stock, and include therein its good-will, business experience, knowledge of the art, and its special corporate privileges, such as succession, perpetuity, the right of eminent domain, etc. Now, none of these elements in the present case are derived from

the federal government. The corporate existence of the Western Union Telegraph Company is derived from the State of New York. The act of 1866 is expressly directed to corporations erected by State authority. The telegraph company did not derive from the federal government a right to condemn property and to acquire a right of way from the owners thereof, except by purchase; *having acquired this right, the further right to do interstate business comes from the constitution.* Or, better expressed, *it exists under the constitution without the asking.*

The case is distinguishable from the California case, 127 U. S. 1, in that the corporation therein involved was primarily a creation of the federal government. That decision does not go so far as to hold that, had the railway company been in possession of any franchise privileges derived from the State, the value of such rights might not be reasonably taxed. See Hamilton *v.* Mass., 6 Wall. 632–644, and Thompson *v.* Pacific Railroad Co., 9 Wall. 579. The Court say, in the California case: "The State legislation was probably procured to remove all doubts with regard to the company's power to construct such road. It is apparent, however, that the franchise to do so was fully conferred by Congress, and that the franchise was accepted and the roads have been constructed in conformity thereto."

The party owning a public way cannot even grant a monopoly to one telegraph company, thereby excluding others, for that would be contrary to public policy, and void as in restraint of trade. See Western Union Telegraph Company *v.* B. & O. Telegraph Company, 23 Federal Rep. 12.

Same parties, 19 Fed. 662.

Western Union Telegraph Company *v.* American Telegraph Company, 9 Bis. 72.

Western Union Telegraph Company *v.* American Telegraph Company, 65 Georgia, 160.

The act of 1866 simply defines the right which for all practical purposes previously existed. In the previous case, Attorney-General of Massachusetts *v.* Western Union Telegraph Company, 125 U. S. 530, this Court say: "The act of 1866 is a merely permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built alone by the United States, or over and under navigable streams, or over bridges not built or owned by the federal government, carries with it any exemption from the ordinary burdens of taxation." The act of 1866 was substantially a contract or arrangement for the sending of government messages by telegraph in exchange for certain property advantages to the company. If the telegraph companies were limited to post-roads, they would be materially crippled in the service; for, while substantially all post-roads are railroads or highways by land or water, not all highways are post-roads. *All highways are, however, channels of interstate commerce, and as such, under the rule in the Pensacola case and the Wabash case, are proper courses for the transmission of intelligence by electricity.* The State owns its post-roads the same as it owns its other highways. It has even been held that the United States cannot construct the post-roads within a State without the permission of the State. Cleveland Railroad Company *v.* Franklin Canal Company, 1 Pitts. L. J. 142. It can use the roads already established unquestionably for the carrying of mails. So also can telegraph companies use the same for commerce by electricity when the company has acquired the right of way, as it must, independent of the act of 1866.

The supreme court of this State, in Pierce *v.* Drew, 136 Mass. 82, held that "the use of a portion of a highway for the public use of companies organized under the laws of the State for the transmission of intelligence by electricity is subject to the supervision of local municipal authorities,

which has been permitted by the Legislature as a public use similar to that for which the highway was originally taken, or to which it was originally devoted, and that the owner of the fee is entitled to no further compensation" And every State over which the company has stretched its wires has by its legislation recognized this right. The Court, in the Massachusetts case referred to, further say: "The discovery of the telegraph developed a new and valuable mode of communicating intelligence Its use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post-boy or the mail coach. It is a newly discovered method of exercising the old public easement, and all appropriate method must have been deemed to have been paid for when the road was laid out. Under the clause to regulate commerce among the States, conferred on Congress by the constitution of the United States, although telegraphic communication was unknown when it was adopted, it has been held that it is the right of Congress to prevent the obstructing of telegraphic communication by hostile State legislation, as it has become an indispensable means of inter-communication." This decision must be read in connection with the decision in the Wabash case and other recent decisions, wherein the Court has held that, in the absence of any action by Congress, this inter-communication is free from hostile State legislation.

Under the ruling in the Pensacola case, corporations and individuals may be regarded as upon the same footing. See also Welton *v.* Missouri, 91 U. S. 275, and Mobile *v.* Kimball, 102 U. S. 691.

VI.

The fundamental insufficiency of the defendant may be more broadly stated. The privilege claimed herein by the defendant is not a franchise in the sense in which the

term is used in the decisions wherein it has been held that a federal franchise may not be taxed. A franchise is a prerogative right or privilege of public concern existing primarily in the sovereignty in distinction from the people at large; a right which may be granted by the sovereignty, and which, except for such grant, does not exist in the citizens at large. It is a right which partakes of the ruling power in its governmental or sovereign capacity, in distinction from its power as a mere contracting party under the laws of the land. When the State makes a contract for supplies, it does not exercise any of its sovereign powers. When the State arranges for its services as a citizen might, in that transaction it is simply a party to a contract. The fact that it might condemn property under its right of eminent domain does not give any peculiar character to common commercial transactions. The federal government owns the public domain, and when it proposed to the telegraph companies that all who accepted the act of 1866 might pass over with their wires, and take poles and stones and the consideration named, it no more granted a franchise than it did when it sold its timber and land for a price in money. As was said in the previous case, the act of 1886 was merely "a permissive statute, and carried no exemption from the ordinary burden of taxation." The permission given by the government was the permission of a party holding and controlling real estate, which must be dealt with exactly as a private party must be dealt with before a line of wire can be extended over his property.

There is an intimation that it is assumed by the defence that the government, under its right to establish post-roads, has acquired therein a certain property or easement, a part of which may be parcelled out to other parties for other purposes; but such a proposition of course cannot be seriously pressed. The government has no more power to designate post-roads as channels of interstate commerce, or courses for

telegraph lines, than it has to designate any and all other public roads.

Back of all this, however, is the proposition that, independent of and without any designation, the right to use such public roads for interstate business exists in all the inhabitants of the United States. How far Congress may control that privilege under its power to regulate commerce need not be discussed, for no attempt has been made to that end.

VII.

The defendant further complains that the telegraph company is the owner of real estate valued at three million forty-four thousand two hundred and eighty-two dollars ($3,044,282). Of this amount, only $2,633,371 represent the cost of property actually owned in fee. The balance of the property consists of buildings upon leased land. The most of this real estate is in New York City, and the same is subject to a mortgage amounting to $1,336,000. This is half of the amount of the real estate actually owned by the company. Of course it is only the margin of the property above the mortgage that is included in the value of the capital stock. Even if the defendant, on abstract principles, has an equity in its contention on this point, it is not a matter of such importance as to warrant any interference by the courts, for only about one-fiftieth of such valuation is appropriated to Massachusetts. Besides, the company gains in another respect a much larger advantage from the Commonwealth. It will be seen by the findings of the master that the average number of wires upon each line throughout the entire territory covered by the company is $3\frac{19}{100}$, while in the State of Massachusetts the average is $4\frac{80}{100}$. This for the year 1888, and for the years 1886 and 1887 the proportion is about the same. The miles of wire, of course, and not the miles of line, measure the revenue of the company and the extent to which it exercises its franchise.

The concession by the State against her own interests more than offsets any inequality on account of outside real estate, even if the defendant be correct in its contentions in that respect, which is by no means admitted.

In Commonwealth *v.* People's Five Cents Savings Bank, 5 Allen, 428–436, it is said that perfect equality in the assessment of taxes is unattainable. Approximation to it is all that can be had. Under any system of taxation, however wisely and carefully drawn, a disproportionate share of the public burden will be thrown on certain kinds of property, because they are visible and tangible while they are of a nature to evade vigilance. It is only where statutes are passed which impose taxes on false and unjust principles, or operate to produce gross inequality, so that they cannot be deemed in any just sense proportional in their effect on those who bear public charges, that courts can interfere and arrest the course of legislation by declaring such an enactment void. A tax would not be declared illegal and void as being unreasonable unless it was plainly and grossly oppressive and unequal, or contrary to common right; nor would it be held to be unproportional unless it violated clearly the rules of proportion which should be properly applied to the subject of a tax. An excise tax is legal if it applies alike on all persons who exercise a particular employment or enjoy the same privilege.

Oliver *v.* Washington Mills, 11 Allen, 268, 279.

VIII.

The fact that the company is an instrument employed by the government is not material in the case. In Railroad Company *v.* Peniston, 18 Wall. 5–33, the Court say: "It may, therefore, be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent of the government merely because it is the property of such an agent. A contrary doctrine would greatly

embarrass the States in the collection of their necessary revenue, without any corresponding advantage to the United States. A very large proportion of the property within the States is employed in execution of the powers of the government."

This case is distinguishable from Osborn *v.* United States Bank, 9 Wheat. 860, and McCulloch *v.* State of Maryland, 4 Wheat. 360, in that the Western Union Telegraph Company was not created by the government as an instrument for carrying into effect the powers vested in the United States. That corporation was an instrument "which the government found ready made," and simply adapted to its purpose, like a thousand other instrumentalities of which the government may make use as a common patron or customer, or as a favored party by virtue of stipulation and contract.

The institution involved in McCulloch *v.* Maryland, 4 Wheat. 316, was, in the language of Chief Justice Marshall, "not considered as a private corporation whose principal object is individual trade and individual profit, but a public corporation created for public and national purpose."

Osborn *v.* United States Bank, 9 Wheat. 860.

The right to tax is an incident to sovereignty, and is coextensive with that to which it is an incident. All objects over which the sovereign power of a State extends are subject to taxation. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission.

McCulloch *v.* Maryland, 4 Wheat. 429.

In the case of Thompson *v.* Pacific Railroad Company, 9 Wall. 579, the Court say: "A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental

agents, and it is not only used, but it is necessary for their agencies. United States mails, troops and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the national service. So are steamboats, horses, stage-coaches, foundries, ship-yards and multitudes of manufacturing establishments. They are the property of natural persons or of corporations, who are agents or instruments of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the States, it is manifest the State governments would be paralyzed. While it is of the utmost importance that all the powers vested by the constitution of the United States in the general government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that State taxation of such property is impliedly prohibited."

IX.

Under the provisions of the constitution respecting commerce the federal government alone can regulate navigation; that is, it alone can regulate, limit and restrain navigation. But this power is limited to commerce and navigation. The question came up in McCready *v.* Virginia, 94 U. S. 391, and it was there held that the State controlled the bed of streams and navigable waters, except as to navigation, "the regulation of which in respect to foreign and domestic commerce has been granted to the United States." In the case of "The Vancouver," 2 Sawyer 381, it was held that the stretching of a cable across a navigable stream which did not interfere with navigation was not unlawful. See also Duluth Lumber Company *v.* St. Louis Boom and Improvement Company, 17 Fedr. Rep. 419; Gould on Waters, section 138. In the absence of legislation, the presumption

is that the use of waters is free. They are no more free on account of the provisions of the act of 1866. The waters are as free for the crossing of a wire (if it does not obstruct navigation) as for the passage of a boat. It is all commerce. Had the act of 1866 permitted a telegraph company to obstruct the stream, they might argue that they had an uncommon privilege; but a declaration that these companies may cross streams if they do not interfere with navigation, is as empty of value as a federal permission to walk over a highway in Massachusetts.

X.

Section 54, chapter 13 of the Public Statutes, provides that the treasurer may commence an action of contract in his own name as treasurer for the recovery of the same, with interest at the rate of twelve per cent., until paid; and that said taxes and penalties may be recovered by information at the relation of the treasurer; "and that upon such information the Court may issue an injunction restraining the further prosecution of the business of the corporation until all such taxes due or penalties incurred shall be paid with interest at the rate aforesaid and costs."

This is a special provision of statute, which should prevail over the general rule respecting judgments. General legislation on a particular subject should give way to special legislation on the same subject. Endlish on Construction of Statutes, 560.

State *v.* Clark, 25 N. J., 45.
State *v.* Morristown, 33 N. J., 61.

If, however, it be held that the interest at twelve per cent. should be computed only up to the date of the decree, it must be held to be the decree to be finally entered upon the mandate of this Court, and not the decree which was vacated when the appeal was taken. In the case of Mitchel *v.*

Harmony, 13 Howard 115, a judgment of the lower Court was affirmed. The plaintiff asked for New York interest at seven per cent. on the judgment under the act of 1842 from the date of the first decision below. It will be seen, of course, that if the matter in controversy had in fact become a judgment, in the first instance, he would clearly have been entitled to such an accretion; but the Court held that the plaintiff was entitled only to interest under the rules, — that is, at interest at the discretion of the Court.

Referring to this case, the Court say, on page 332 of Perkins *v.* Fourniquet, 14 Howard: "The act of 1842 applied to the judgment in the circuit court and it would have carried the State interest until paid, if it had not been brought here by a writ of error" Or, in other words, the Court say, if there had been no writ of error, the potential judgment would have remained and become a judgment in fact, upon which interest would have run; but by the sueing out of the writ of error the judgment became vacated, and the matter remained as unadjudicated, subject to the rule which allowed the Court to fix the amount of damages appropriate to a delay in prosecution.

In the case of Schell *v.* Corcoran, 107 U. S 625–8, the proposition is still more clearly stated. The Court say: "When a mandate of this Court goes to the Court below, it is necessary that that Court with a view to execution should enter a further judgment in accordance with the mandate covering the direction of this Court as to interest and costs in this Court on writ of error. The writ operated as *supersedeas*. The plaintiff in the judgment being stayed as to execution while the case was in this Court, and there being a new judgment rendered by this Court, in the suit the final judgment referred to in section 989 is the judgment as it stands after the affirmance by the Court, and after the Court below rendered such judgment as the mandate of this Court required. Therefore the interest in this case is

interest before final judgment, and is of the same character as the interest allowed before judgment in the suit against a collector where there is no writ of error."

The judgment in the circuit court concluded no question of dispute. It was liable to be changed, as was the decree in the previous case between these same parties. The time when this matter was thus pending on appeal belongs, according to all analogies, to the anti-judgment period; otherwise, under the rules of the Court in the cases cited there is created an intermediate state, into which the original claim has died, and out of which a judgment has not been born. The matter should follow the analogies in admiralty cases, where the Court has distinctly held that an appeal "suspends a sentence altogether, and that it is not *res adjudicata*" until the final sentence of the appropriate Court be pronounced. 5 Cranch, 281.

The exaction referred to does not arise in contract. It is a prerogative right, which of necessity must be executed summarily. The State has provided a remedy for the citizen in respect to an erroneous exaction. Section 64, chapter 13 of the Public Statutes. It is the duty of the party to pay the full assessment in the first instance. This comes from the necessities of the case. The rate of assessment generally on all property is predicated on the enforcement of the law, and a certain yield of available money to meet the estimated necessities of the government. If the enforcement of payment were made a matter of common litigation, the government might be seriously embarrassed in its operation.

The payment of money into court is but an extension of the right to make a tender and a part payment. The rule of the Court respecting the payment of money into court manifestly contemplates common money demands, and not the enforcement of the prerogative right to exact a tax or excise.

The Commonwealth again insists that this corporation,

which has spun its network of wires over the entire State, and for its profit put the highways of the people to an unusual use, which has enjoyed the amplest protection for all its asserted rights, shall submit to a system of taxation, the main imperfection in which consists in its failure to realize from this corporation more than seventy-five per cent., the amount of tax which the principle of the law broadly contemplates, which full exaction, in justice to other property in the State, should be provided for by further legislation.

Respectfully submitted,

A. J. WATERMAN,
Attorney-General.

H. C. BLISS,
Assistant Attorney-General.

A.

CONSTITUTION AND STATUTES OF THE COMMONWEALTH.

Part 2, Ch. 1, Sect. 1, Art. 4, of the Constitution gives the Legislature power to impose "proportionate and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying within the Commonwealth," and also to impose "reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured, or being within the same."

Section 42 of chapter 13 of the Public Statutes reads: —

SECT. 42. Every corporation or association chartered or organized elsewhere, which owns, or controls and uses, under lease or otherwise, a line of telegraph within this commonwealth, shall make all the returns prescribed in section thirty-eight to be made by telegraph companies within the commonwealth, excepting the list of its shareholders; and shall annually pay a *tax* at the same *rate*, and to be ascertained and determined in the *same manner* as is provided in section forty; and all telegraph lines within the commonwealth controlled and used by such corporation or association, shall, for the purposes of this chapter, be taken and considered as part of its own lines.

Section 38 reads: —

SECT. 38. Every corporation chartered by the commonwealth, or organized under the general laws, for purposes of business or profit, having a capital stock divided into shares, excepting banks whose shares are otherwise taxable under this chapter, and excepting those specified in sections forty-three and forty-six, shall annually, between the first and the tenth day of May, return to the tax commissioner, under the oath of its treasurer, a complete list of its shareholders, with their places of residence, the number of shares belonging to each on the first day of May, the amount of the capital stock of the corporation, its place of business, the par

value and market value of the shares on said first day of May. Such return shall, in the case of stock held as collateral security, state not only the name of the person holding the same, but also the name of the pledger and his residence. The returns shall also contain a statement in detail of the works, structures, real estate, and machinery owned by said corporation and subject to local taxation within the commonwealth, and of the location and value thereof. Railroad and telegraph companies shall return the whole length of their lines, and the length of so much of their lines as is without the commonwealth; other corporations required to make a return under this section shall also return the amount, value, and location of all works, structures, real estate, and machinery owned by them and subject to local taxation without the commonwealth: *provided*, that nothing herein contained shall exempt any corporation from making all returns required by its charter.

Section 40 reads: —

Sect. 40. Every corporation embraced in the provisions of section thirty-eight shall annually pay a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock, as determined in the preceding section, after making the deductions provided for in this section, at a rate determined by an apportionment of the whole amount of money to be raised by taxation upon property in the commonwealth during the same current year, as returned by the assessors of the several cities and towns under section eighty-six of chapter eleven, upon the aggregate valuation of all the cities and towns for the preceding year, as returned under sections fifty-four and fifty-five of said chapter: *provided*, that in case the return from any city or town is not received prior to the twentieth day of August, the amount raised by taxation in said city or town the preceding year, as certified to the secretary of the commonwealth, may be adopted for the purpose of this determination; and *provided, further*, that the amount of tax assessed upon polls the preceding year, as certified to the secretary, may be taken as the amount of poll tax to be deducted from the whole amount to be raised by taxation, for the purpose of ascertaining the amount to be raised by taxation upon property.

From the valuation, ascertained and determined as aforesaid, there shall be deducted, — *First*, in case of railroad and telegraph companies, whose lines extend beyond the limits of the commonwealth, such portion of the whole valuation of their capital stock, ascertained as aforesaid, as is proportional to the length of that part of their line lying without the commonwealth, and also an amount equal to the value, as determined by the tax commissioner, of their real estate and machinery located and subject to local taxation within the commonwealth: *second*, in case of other corporations, included in section thirty-eight of this chapter, an amount equal to the value, as determined by the tax commissioner, of their real estate and machinery, subject to local taxation, wherever situated: *provided*, that, whenever the charter of a corporation provides a different method of ascertaining the valuation of its corporate franchise for the purposes of this chapter, the sum shall be ascertained in the method provided in such charter.

Section 39 reads: —

Sect. 39. The tax commissioner shall ascertain, from the returns or otherwise, the true market value of the shares of each corporation included in the provisions of the preceding section, and shall estimate therefrom the fair cash valuation of all of said shares constituting its capital stock on the first day of May next preceding, which shall be taken as the true value of its corporate franchise for the purposes of this chapter. He shall also ascertain and determine the value and amount of all real estate and machinery owned by each corporation, and subject to local taxation, and of the deductions provided in the following section; and for this purpose he may take the amount or value at which such real estate and machinery are assessed at the place where the same are located as the true amount or value; but such local assessment shall not be conclusive of the true amount or value thereof.

Section 53 reads: —

Sect. 53. The tax commissioner shall, as soon as may be after the first Monday in August in each year, notify the treasurer of each corporation, company, copartnership, or

association liable thereto, of the amount of its tax under sections twenty-five, forty, forty-two, forty-five, forty-seven, fifty, and fifty-two, to become due and payable to the treasurer of the commonwealth within thirty days from the date of such notice: *provided*, that it shall not be due and payable earlier than the first day of November. Such notice shall also state that within ten days after the date thereof the said corporation, company, copartnership, or association may apply for a correction of said tax, and be heard thereon before the board of appeal hereinafter established.

Section 61 reads: —

SECT. 61. Any party aggrieved by the decision of the tax commissioner arising under the provisions of sections twenty-five to fifty-eight inclusive, excepting corporations named in section forty-six, may apply to the board of appeal constituted under the provisions of the following section for a correction of the same.

Section 62 reads: —

SECT. 62. The treasurer and the auditor of the commonwealth, together with one member of the council to be named by the governor, shall constitute a board of appeal, to which board any party aggrieved by a decision of the tax commissioner upon any matter arising under this chapter, from his decision upon which an appeal is given, may apply within ten days after notice of such decision for a correction of the same. Upon such an appeal said board shall, as soon as may be, give a hearing to such a party, and shall thereupon decide the matter in question, and notify the tax commissioner and the party appealing; and such decision shall be final and conclusive as to the rights of the parties affected, although payments may have been made as required by the decision of the tax commissioner appealed from. Any over-payment of tax, determined by the decision of said board of appeal, shall be reimbursed from the treasury of the commonwealth.

Section 54 reads: —

SECT. 54. Any corporation, company, copartnership, or association taxable under the provisions of sections forty,

forty-two, forty-three, forty-five, forty-seven, fifty, and fifty-two, neglecting to make the returns required by this chapter, or refusing or neglecting, when required thereto, to submit to the examinations provided for therein, shall forfeit two per cent. upon the par value of its capital stock; all which penalties may be recovered by an action of tort, brought in the name of the commonwealth, either in the county of Suffolk or in the county where the corporation is located If any corporation, company, copartnership, or association fails to pay the taxes required to be paid to the treasurer of the commonwealth under the provisions of said sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, fifty-one, and fifty-two, he may forthwith commence an action of contract in his own name, as treasurer, for the recovery of the same, with interest at the rate of *twelve per cent.* per annum until the same are paid. All penalties under this section, and under sections seven, forty-seven, fifty, and fifty-two, may also be enforced, and all taxes under said sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, fifty-one, and fifty-two, may also be collected by information brought in the supreme judicial court at the relation of the treasurer of the commonwealth, and upon such information the court may issue an injunction restraining the further prosecution of the business of the corporation, company, copartnership, or association, until all such taxes due or penalties incurred shall be paid, with interest at the rate aforesaid, and costs. In any proceeding under this section the certificate of the tax commissioner or his deputy shall be competent evidence of all determinations made and notices given by him, and of all values, amounts, and other facts required to be fixed or ascertained by him under this chapter.

These sections have been followed except that the respondent *did* not apply *to the Board of Appeal.* It is conceded also that the respondent has not paid the tax assessed.

B.

PUBLIC STATUTES, CHAPTER 109.

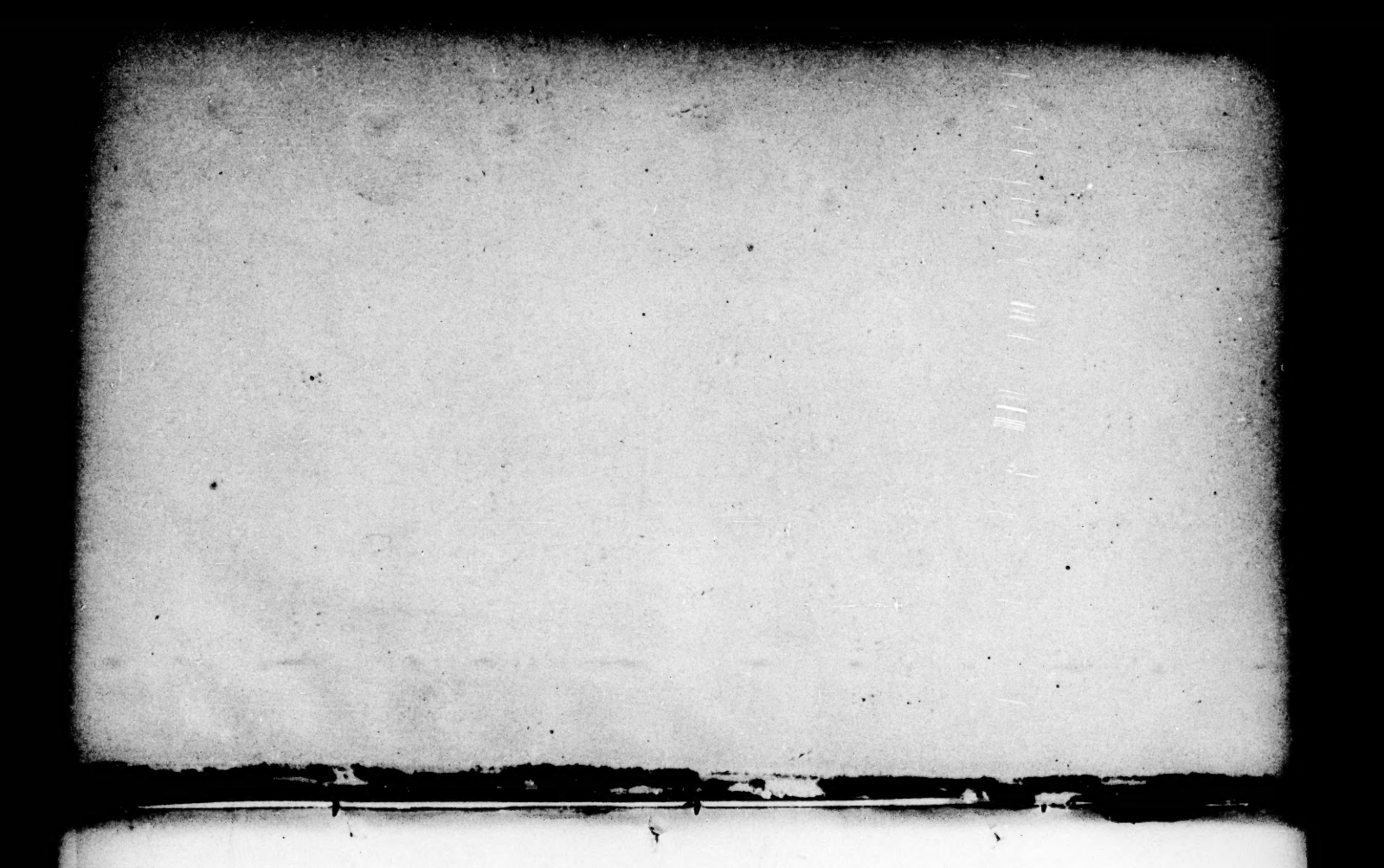
SECTION 1. Every company incorporated for the transmission of intelligence by electricity shall possess the powers and privileges, and be subject to the duties, restrictions, and liabilities, prescribed in this chapter.

SECT. 2. Each company may, under the provisions of the following section, construct lines of electric telegraph upon and along the highways and public roads, and across any waters within the commonwealth, by the erection of the posts piers, abutments, and other fixtures (except bridges) necessary to sustain the wires of its lines; but shall not incommode the public use of highways or public roads, nor endanger or interrupt the navigation of any waters.

SECT. 3 The mayor and aldermen or selectmen of a place through which the lines of a company are to pass shall give the company a writing specifying where the posts may be located, the kind of posts, and the height at which and the places where the wires may run. After the erection of the lines, having first given the company or its agents opportunity to be heard, they may direct any alteration in the location or erection of the posts, piers, or abutments, and in the height of the wires. Such specifications and decisions shall be recorded in the records of the city or town.

RULE 36 OF THE UNITED STATES CIRCUIT COURT.

In actions where the sum demanded is certain, or may be made certain by computation, the defendant, on motion, may have leave, on terms, to bring the money which he admits due into court, and thereupon so much of the plaintiff's demand shall be struck out of the declaration; and if the plaintiff will not accept the money with costs to the time of bringing the money into court, he shall proceed at his peril, and shall not in any event be allowed to tax costs for witnesses to prove the amount so admitted to be due; and if upon the trial the plaintiff shall not prove a greater sum due than the money brought into court, the verdict shall be for the defendant.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, EX REL., &c., *Appellant,* *against* THE WESTERN UNION TELEGRAPH COMPANY.	Nos. 1126, 1128, 1130.
	CROSS APPEALS.
THE WESTERN UNION TELEGRAPH COMPANY, *Appellant,* *against* THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, EX REL., &c.	Nos. 1127, 1129, 1131.

BRIEF FOR THE WESTERN UNION TELEGRAPH COMPANY.

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BRIEF FOR THE WESTERN UNION TELEGRAPH COMPANY.

Statement.

These are three suits brought by information by the

State of Massachusetts against the Western Union Telegraph Company, for taxes for the years 1886, 1887 and 1888. They were tried and are heard here as one case, by stipulation.

The Company each year offered to pay, and on leave paid into Court a sum equal to the full rate of tax imposed by the State for that year upon property at large, including franchises of telegraph companies, both foreign and domestic, computed upon the value as a basis of assessment, of its property within the State.

Against the tax as charged, the Company contends, first, that the law by which it is imposed exacts a higher rate from telegraph companies whose lines cross the State boundary than from those whose lines are wholly within the State, and because of that fact, quite irrespective of their being foreign or domestic corporations. This is believed to be a direct tax upon crossing the State line—in other words, upon interstate commerce. Next, the Company objects to the tax as charged, because the law includes within the basis of assessment rights and franchises derived from the United States, and which are also exercised directly in its service. Finally, the Company objects to the *amount* of the decree, for reasons stated, which are involved with the doctrine of application of payments.

Assignment of Errors.

I.

In the suit brought to recover the taxes assessed for the year 1886, the Court erred in holding:

"That the method of valuation, assessment and taxation provided by the laws of Massachusetts upon the franchise of the defendant corporation is not, as was claimed and contended by said defendant, illegal and unconstitutional under the Constitution and laws either of the State of Massachusetts or the United States—that is to say, either under the Constitution of the United States, Art. I., Sec. 8; Art. III., Sec. 2; Art. VI., Amendments 5 and 14; under the Revised Statutes of the United States, Sections 5263, 5264, 5265, 5266, 5267, 5268, 5269, including a revision and consolidation of the Act of July 24, 1866, Chap. 230, accepted by the defendant before the revision, or Section 221, or under the Constitution of said State, Part 1, Art. X.; Part I, Chap. 1, Sec. 4; or Chap. 13 of its Public Statutes—but was and is in conformity with and authorized by said constitutions and laws, and that there was therefore due the plaintiff on the 5th day of November, 1886, the sum of $11,416.26."

Record, p. 12.

II.

In the suit brought to recover the tax assessed for the year 1887, the Court erred in holding:

"That the method of valuation, assessment and taxation provided by the laws of Massachusetts upon the franchise of the defendant corporation is not, as was claimed and contended by said defendant, illegal and unconstitutional under the Constitution and laws either of the State of Massachusetts or the United States—that is to say, either under the Constitution of the United States, Art. I., Sec. 8; Art. III., Sec. 2; Art. VI.,

Amendments 5 and 14; under the Revised Statutes of the United States, Sections 5263, 5264, 5265, 5266, 5267, 5268, 5269, including a revision and consolidation of the Act of July 24, 1866, Chap. 230, accepted by the defendant before the revision, or Sec. 221, or under the Constitution of said State, Part I, Art. X.; Part II, Chap. 1, Sec. 4; or Chap. XIII. of its Public Statutes—but was and is in conformity with and authorized by said constitutions and laws, and that there was therefore due the plaintiff on the 5th day of November, 1887, the sum of $15,085.38.

Record, p. 24.

III.

In the suit brought to recover the tax assessed for the year 1888, the Court erred in holding:

"That the method of valuation, assessment and taxation provided by the laws of Massachusetts upon the franchise of the defendant corporation is not, as was claimed and contended by said defendant, illegal and unconstitutional under the Constitution and laws either of the State of Massachusetts or the United States—that is to say, either under the Constitution of the United States, Art. I., Sec. 8; Art. III., Sec. 2; Art. VI., Amendments 5 and 14; under the Revised Statutes of the United States, Secs. 5263, 5264, 5265, 5266, 5267, 5268, 5269, including a revision and consolidation of the Act of July 24, 1866, Chap. 230, accepted by the defendant before the revision, or Sec. 221, or under the Constitution of said State, Part I., Art. X., Part. II., Chap. I., Sec. 4, or Chap. XIII. of its Public Statutes—but was and is in conformity with and authorized by said Constitution and laws; and that there was, therefore, due the plaintiff on the 9th day of November, 1888, the sum of $14,861.09."

Record, p. 35.

IV.

In the suit brought to recover the tax assessed for the year 1886, the Court below erred in applying the amount paid into Court, first to extinguish the entire interest accrued at the date of such payment upon the full amount claimed by the Commonwealth.

V.

In the suit brought to recover the tax assessed for the year 1887, the Court below erred in applying the amount paid into Court, first to extinguish the entire interest accrued at the date of such payment upon the full amount claimed by the Commonwealth.

VI.

In the suit brought to recover the tax assessed for the year 1888, the Court below erred in applying the amount paid into Court, first to extinguish the entire interest accrued at the date of such payment upon the full amount claimed by the Commonwealth.

ARGUMENT.

I.

The rate of the general tax for 1886 on property within the State, including franchises of telegraph com-

panies, both foreign and domestic, was $14.48 upon each $1,000 of valuation.

Information for 1886, Record, p. 2.

The value of the company's lines and other property that year within the State was $422,756.75.

Answer for 1886, pp. 5, 8.

The application of the rate above given to this value as a basis yields a result of $6,121.52, which sum the company tendered and paid into Court. The tax charged for the same year was $11,416.28 being the result reached by the application of the rate above given ($14.48), to the sum of $788,416, which was taken as a basis of assessment by the State. This basis was reached by exacting from the company a return of the full amount and value of its capital stock; also the total length of its lines of telegraph, and the length of its lines within the State, and then taking as a basis of assessment a sum bearing the same relation to the full value of the company's capital which the length of its lines within the State bears to the total length of all its lines.

In the case of a telegraph company whose lines do not cross the State boundary the law takes the whole capital stock as the basis of assessment.

No contention is made against that rule of apportionment which presents these two. In other words, the law goes on the assumption, first, that the actual value of the capital stock accurately represents the value of that franchise upon which the statute declares its purpose to impose a tax; second, that the location of the mileage, either wholly within or partly without the State, represents with sufficient accuracy the proportion-

ate value which may in each district be rightly assessed there for taxation.

In the matter of exemption, as distinguished from apportionment, the law prescribes that the value, as determined by the Tax Commissioners, of certain real estate and machinery shall be deducted from the basis of assessment as previously ascertained.

If the company be one whose lines do not cross the State boundary, the value of its real estate and machinery, *wherever situate*, shall be deducted.

If the company be one whose lines cross the State boundary, as do those of the Western Union, then the value of the real estate and machinery *within the State* shall be deducted from the value of that portion of the capital stock which is taken as the basis of assessment. This, it will be remembered, is the same proportion of the whole capital as the proportion of the whole line which is within the State.

Approximate justice would be in each case to take the whole capital and deduct the value of the real estate and machinery, *wherever situate*, proceeding afterwards to take in one instance the whole remaining value of the capital, and in another a proportion of it, as the basis of assessment.

The rule in force, on the other hand, makes an essential difference between corporations whose lines cross the State boundary and those whose lines do not cross it. Companies of the latter class are made to pay taxes to Massachusetts upon a proportion of the value of their real estate and machinery outside the State equal to that portion of their entire line which is within the State.

A company, on the other hand, whose lines do not

cross the State boundary, pays no taxes at all upon real estate or machinery, wherever situate.

This difference finds practical expression in the case at bar. The defendant company is assessed a considerable sum, on account of property outside the State, which it would not be asked to pay, although it owned the same lines within the State and the same property outside the State, if only its lines did not cross the State boundary.

In other words, this differential charge is based upon the fact that its lines within the State extend beyond the boundary.

This is a tax upon crossing the State line, and as such is believed to be a regulation of insterstate commerce, and, as such, beyond the lawful power of the State.

The amount of tax assessed against the Western Union Company in this way, for a proportion of the value of its real estate and machinery outside the State, and which it would not have been required to pay if its lines within the State had not extended across the State line, was for the year 1886, $816.45 ; for the year 1887, $873.40 ; and for the year 1888, $798.91.

The inclusion of these amounts, if the point is correctly made, and with no authority to the State officers to receive less, renders the whole tax uncollectible ; nevertheless, the company, willing and desirous to bear its share of the public burden, tendered, as above, an amount equal to the general rate of taxation, computed on the basis of the value of its property in Massachusetts.

That the question thus raised is rightly considered only when it is considered as a question of *power*, and not as a question of *amount* or of *degree*, and on that

ground to be lightly treated, is fully disclosed by the opinion of this Court in McCulloch vs. Maryland, 4 Wheaton, 316,429:

"If we measure the power of taxation residing in a State by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligent standard applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the Government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is in another to preserve. *We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse, of the power.* The attempt to use it on the means employed by the Government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give."

At another place in the same opinion another phase of the situation arising from this differential tax is brought under review. It will be noticed that the tax is imposed upon *property of the same description* at one rate or another, according as the company's lines do or do not extend beyond the State. This Court, in the opinion above cited, has plainly intimated that even in taxing the property of an agent or instrument of interstate commerce, the State is limited to a tax upon that

property *in common with other property of the same description throughout the State* (p. 436).

"This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the Government of the Union to carry its powers into execution. Such a tax must be unconstitutional."

The Western Union Company, moreover, has duly accepted the provisions of the Act of Congress of July 24, 1866.

Testimony of Norvin Green, Record, p. 64.

Concerning the effect of this statute, this Court, in Pensacola vs. Western Union Tel. Co., 96 U. S., 1, has said (see p. 11):

"The statute of July 24, 1866, in effect amounts to a prohibition of all State monopolies in this particular. It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the Government of the United States and its citizens, that *the erection of telegraph lines shall, so far as the State interference is concerned, be free to all who will submit to the conditions imposed by Congress*, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the National Government for this national privilege. *To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the States*, and is appropriate legislation to carry into execution the powers of Congress over the postal service."

It cannot be said that the erection of telegraph lines is, so far as the State interference is concerned, free to all who will submit to the conditions imposed by Congress, so long as the State is imposing a differential tax which has no other basis than the fact that the lines taxed cross the boundary of the State.

Suppose, for instance, the State of Florida, in the Pensacola case, had come before the Court to uphold, not, as in that case, an absolute prohibition, but a tax which was prohibitory upon the Western Union Company's crossing the State line and building within the State the line which in that case it was proposed to build? The principle of that case would be in nowise changed by such an amendment of the facts, nor would one word of the opinion have to be changed.

Such an amendment of the facts in the Pensacola case, however, would make that case identical with this one, except so far as that the differential tax in this case is not shown to be prohibitory. If the tax which this case draws in question be sustained, there is no obvious reason why the State of Massachusetts is not free to increase the tax at will, until it is prohibitory. The question is one of power and not of degree.

II.

In the statement mention has already been made of the fact that the Circuit Court rendered no opinion in this case, but disposed of it entirely upon the authority of Western Union Telegraph Co. vs. Massachusetts,

125 U. S., 530. The point just now discussed is disposed of in that case in these words (p. 552):

"It is urged against this tax, that in ascertaining the value of the stock no deduction is made on account of the value of real estate and machinery situated and subject to local taxation outside of the Commonwealth of Massachusetts. The report of Examiner Fiske, to whom the matter was referred to find the facts, states that the amount of the value of said real estate outside of its jurisdiction was not clearly shown, but it did appear that the cost of land and buildings belonging to the company and entirely without that State was over three millions of dollars. In the statement of the treasurer of the company it is said that the value of real estate owned by the company within the State of Massachusetts was nothing. Since the corporation was only taxed for that proportion of its shares of capital stock which was supposed to be taxable in that State on the calculation above referred to, and since no real estate of the corporation was owned or taxed within its limits, we do not see why any deduction should be made from the proportion of the capital stock which is taxed by its authorities. But if this were otherwise we do not feel called upon to defend all the items and rules by which they arrived at the taxable value on which its ratio of percentage of taxation should be assessed; and even in this case, which comes from the Circuit Court and not from that of the State, we think it should appear that the corporation is injured by some principle or rule of the law not equally applicable to other objects of taxation of like character. Since, therefore, this Statute of Massachusetts is intended to govern the taxation of all corporations therein, and doing business within its territory, whether organized under its own laws or those of some other State, and since the principle is one which we cannot pronounce to be an unfair or an unjust one, we do not feel called upon to hold the tax void, because we might have adopted a different system had we been called upon to accomplish the same result."

In this case it is not meant to urge any objection whatever against that rule of apportionment which

takes as its postulate, that whenever the lines of a telegraph company are partly within and partly without the State, the relative length of the two portions offers a fair measure of the proportion of the entire capital employed within the State and without. Nor are the "items and rules" by which the State of Massachusetts arrived at the taxable value upon which its ratio of percentage should be assessed, at all generally pressed in this case upon the consideration of the Court.

Instead of this, the rule of apportionment adopted by the State is accepted frankly, and the company does not insist that it be in every particular impartially applied.

What is asked, however, and is urged, is that if items or rules are shown, which are of such a character that their existence results in a differential tax imposed upon what the State may not lawfully tax, then this Court shall interfere, not primarily because the rule of apportionment is not impartially applied, nor yet because some items are unjustly taxed, but because it is the boundary between State and Federal power which is transgressed by the partial ruling, and because the item wrongly included is reached only by seizing it away from the Federal jurisdiction. When this situation is presented, it is believed that the question for this Court is not, whether the wrongful exaction amounts to enough to require this Court, on general principles, to interfere, but is only whether there is shown an appreciable tax imposed on a forbidden subject.

III.

The restrictions and obligations imposed by the Act of July 24, 1866 (Statutes, Vol. XIV., p. 221), are as follows :

SEC. 2. And be it further enacted, That telegraphic communications between the several departments of the Government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General.

SEC. 3. And be it further enacted, That the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association or person. Provided, however, that the United States may at any time after the expiration of five years from the date of the passage of this act, for postal, military or other purposes, purchase all the telegraph lines property and effects of any or all of said companies, at an appraised value to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

For these considerations to be first accepted in writing the United States on its part has stipulated (§ 1) that the company :

"Shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under or across the navigable streams or waters of the United States." * * * "And any of said companies shall have the right to take and use from such public lands the necessary stone, timber and other materials for its posts, piers, stations and other needful uses in the construction, maintenance and operation of said lines of

telegraph, and make, pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which its said lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other."

Three several times this Court has awarded to the Western Union Company important and valuable relief expressly on the ground of the company's right and privilege acquired under this act. One of these cases, *Penscola vs. West. Un. Tel. Co.*, has already been cited (*supra*). The other two are *Telegraph Co. vs. Texas, 105 U. S., 554, and West. Un. Tel. Co. vs. Massachusetts, 125 U. S., 530.* In the first of these the Court say (p. 464):

"Congress, to facilitate the erection of telegraph lines, has by statute authorized the use of the public domain and the military and post roads, and the crossing of the navigable streams and waters of the United States for that purpose. As a return for this privilege, those who avail themselves of it are bound to give the United States precedence in the use of their lines for public business at rates to be fixed by the Postmaster-General. Thus, as to Government business, companies of this class become Government agencies. The Western Union Telegraph Company having accepted the restrictions and obligations of this provision of Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a Government agent for the transmission of messages on public business."

Again, in the second, the Court say (p. 534):

"The effect of this injunction, if obeyed, is to utterly suspend the business of the Telegraph Company and defeat all its operations within the State of Massachusets. The Act of Congress says that the State accepting its provisions 'shall have the right to construct, maintain and operate lines of telegraph

through and over any portion of the public domain of the United States, over and along any of the military and post roads of the United States.' It is found in this case that 2,334.55 miles of the company's lines out 2,833.05, on which this tax is assessed, are along and over such post roads, and of course the injunction prohibits the operation of the defendant's telegraph over those lines, nearly all it has in the State. If the Congress of the United States had the authority to say that the company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the State can have no authority to say it shall not be done. The injunction in this case, though ordered by a Circuit Court of the United States, is only granted by virtue of Section 54 of Chapter XIII. of the Public Statutes of Massachusetts. If this statute is void, as we think it is, so far as it prescribes this injunction as a remedy to enforce the collection of its taxes by the decree of the Court awaiting it, the injunction is erroneous."

In view of these positions of this Court, it seems to go without saying that the right, which for a consideration paid to the United States the Western Union Company has acquired under the Act of July 24, 1866, is a franchise of great value to that company, protecting its interstate and international business, making that scope of its business possible, and materially increasing the value of its stock, including that proportion of its stock which is in Massachusetts made the basis of assessment. In this way it occurs that a franchise derived from the United States is by the State of Massachusetts subject to taxation. Uncontradicted evidence, disclosing that the proportion of this franchise, thus taxed in Massachusetts, is a material feature in the basis of assessment there, is included in the record.

In *California vs. Central Pacific R. R. Co., 127 U. S., 1*, this Court say, at page 35:

"The Central Pacific Railroad Company was consti-

tuted by the consolidation of two State corporations of California, but derived many of its franchises and privileges from the United States. * * * In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief-Justice MARSHALL said in McCulloch vs. Maryland: 'The power to tax involves the power to destroy.' Recollecting the fundamental principle that the Constitution, Laws and Treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the Government that confers it. To tax it is not only derogatory to the dignity, but subversive to the powers of the Government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject. The principles laid down by this Court in McCulloch vs. Maryland, 4 Wheat., 316; Osborn vs. The Bank of the United States, 9 Wheat., 738; and Brown vs. Maryland, 12 Wheat., 419; and in numerous cases since which have followed in their lead, abundantly sustain the views we have expressed."

It is in *McCulloch vs. Maryland*, already cited, that this Court has so strongly declared the propriety of convenience of treating the question thus raised always as a question of power, and never as a question of degree.

IV.

The frame of the Massachusetts Statute is such that it is apparently not possible to distinguish and deduct from the whole tax levied that sum or proportion which,

in fact, is levied upon the franchise, or the value of the franchise, which the Western Union Company has obtained from the United States by contract made with United States under the Act of July 24, 1866.

The instructions of the statute to the officers of the State are in this regard peremptory, both as to what the basis of assessment shall include, and what shall be exempt from it. They are to include the whole value of a proportion of the capital stock, and are to deduct only the value of certain real estate and machinery. There is no more warrant for an inquiry on their part, or a deduction by them made with reference to the value of the Federal franchise, than for any other positive transgression of the statute.

Hence the case at bar does not come within the ruling of this Court in Ratterman vs. W. U. Tel. Co., 127 U. S., 411, in which the Court say that

"where the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the State, the Court will act upon this distinction, and will restrain the tax upon interstate commerce while permitting the State to collect that arising upon commerce solely within its own territory."

Instead of this, the case at bar falls directly within the rule announced in *California vs. Pacific R. R. Co.*, already cited.

"It conclusively appears, therefore, that the Southern Pacific Railroad Company did receive from the United States Government, and still enjoys, important franchises connected with its railroads.

It follows that in each one of the cases now before us the assessment made by the State Board of Equalization comprised the value of franchises or property which the Board was prohibited by the Constitution of the State or of the United States from including therein;

and that these values are so blended with the other items of which the assessment is composed that they cannot be separated therefrom. The assessments are, therefore, void. This renders it unnecessary to express any opinion on the application of the Fourteenth Amendment, as the result would not be different whatever view we might take on that subject."

California vs. R. R. Co., 127 U. S., 1.

This point is expressly raised by respondent's answer:

"This respondent avers that the mode of valuation and assessment prescribed by said statute does, in fact, include the full values of all the franchises and powers vested in, acquired, possessed, used and exercised by said company by or under said Act of Congress of July 2[illegible], 1866, or otherwise, as well as the full value of all such property; that all said values are in said valuation and assessment indistinguishably and inseparably blended with each other so as to make a valuation largely in excess of the fair value of said property or of any property legally subject to taxation in said State, and are, as well as such tax, therefore, unconstitutional and void."

Record, pp. 7, 19, 31.

V.

It will be observed that the Circuit Judge rendered no opinion in these cases, but simply announced that

"upon the authority of the case of the Western Union Telegraph Company vs. The Attorney-General of Massachusetts, 125 U. S., 530, the plaintiff herein is entitled to a decree" *(Record, pp. 12, 23, 35).*

This makes it proper to suggest that these cases were not brought to this Court until after conference with

the Circuit Judge, held subsequent to the entry of decree.

It is, of course, frankly conceded that the case of Massachusetts vs. W. U. Tel. Co., above referred to, is between the same parties and upon substantially identical facts involved with the collection of taxes by the State of Massachusetts from the Western Union Telegraph Company for the year 1885. The Circuit Court may easily have felt that in view of that decision the only scope for judicial action in these cases was in this Court.

The decision in that case, when examined, will be found to rest upon the Court's view of a position ascribed to the defendant company, which in these cases the defendant respectfully but entirely disclaims (125 U. S., pp. 546, 547):

"The answer of the defendant corporation set up that of its 2,833.05 miles of line within the State of Massachusetts, more than 2,334.55 miles were over, under or across post roads, made such by the United States, leaving only 498.50 miles not over or along such post roads, on which the company offered to pay the proportion of the tax assessed according to mileage by the State authorities.

The main ground on which the telegraph company resisted the payment of the tax alleged to be due, and on which probably the case was removed from the State Court into the Circuit Court of the United States, is that it is a violation of the rights conferred on the company by the Act of July 24, 1866, now Title 65, Sections 5263 to 5269 of the Revised Statutes. The defendant alleges that it had accepted the provisions of that law, and filed a notification of such acceptance with the Postmaster-General of the United States June 8, 1867. The argument is, therefore, that by virtue of Section 5263 the company has a right to exercise its functions of telegraphing over so much of its lines as is connected with the military and post roads of the United States, which have been declared to be such by law,

without being subject to taxation therefor by the State authorities."

* * * (p. 547):

"The telegraph company which is the defendant here, derived its franchise to be a corporation and to exercise the function of telegraphing from the State of New York. It owes its existence, its capacity to contract, its right to sue and be sued, and to exercise the business of telegraphy, to the laws of the State under which it is organized. But the privilege of running the lines of its wires 'through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, * * * and over, under or across the navigable streams or waters of the United States,' is granted to it by the Act of Congress. This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams or over bridges not built or owned by the Federal Government, carries with it any exemption from the ordinary burdens of taxation.

"The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts, and the proportion of the length of its lines in that State to their entire length throughout the country is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by § 5263 of the Revised Statutes, or by the commerce clause of the Constitution."

Respondent's answer in each of these cases (*e* 9, Answer for 1886, Rec., p. 8) expressly avers that:

"It is ready and willing to pay the said State at the rate per $1,000 (to wit, $14.48) fixed by said State

upon the fair value of all its real and personal property situated, owned and used by it in said State, to wit, on said $422,756.75, as aforesaid, not claiming that its actual tangible property is, as such, exempt from taxation because it is placed on post roads or navigable waters or is used for interstate commerce; and it prays leave of this Court to bring and pay, and by said leave doth bring and pay, into said Court for the use of the complainant, to be by it taken without condition or future objection, the sum of $7,574.47, being, as aforesaid, $14.48 per $1,000 of said $422.756.75 (as the full and true value of all said property), with interest at the rate of 12 per cent. per annum thereon from the 3d day of November, A. D. 1886, to the time of said payment, together with $40.60, costs of this suit to said time, and the Clerk's fees for such payment."

The opinion of this Court, in the case in 125 U. S., upon which the Circuit Court in these cases relied, after stating the view taken by this Court of the defendant company's position in that case, goes on to rest the contrary position of this Court upon the following authorities:

Railroad Company vs. Penniston, 18 Wallace, 5.
Thompson vs. Pacific Railroad Co., 9 Wall., 579.
National Bank vs. Commonwealth, 9 Wall., 353.

Respecting the application of those cases to the cases now at bar, no better expressions can be used than those of this Court in the case of California vs. Pacific Railroad Cos., *supra*, at page 41:

"Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the Government that

confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of the Government and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject. The principles laid down by this Court in McCulloch vs. Maryland, 4 Wheat., 316; Osborn vs. The Bank of the United States, 9 Wheat., 738; and Brown vs. Maryland, 12 Wheat., 419; and in numerous cases since which have followed in their lead, abundantly sustain the views we have expressed. It may be added that these views are not in conflict with the decisions of this Court in Thomson vs. Pacific Railroad, 9 Wall., 579, and Railroad Co. vs. Peniston, 18 Wall., 5. As explained in the opinion of the Court in the latter case, the tax there was upon the property of the company and not upon its franchises or operations (18 Wall., 35, 37).

In other words, accepting and complying fully with the views announced by this Court in Massachusetts vs. W. U. Tel. Co., 125 U. S., 530, and tendering and paying into Court all that the freest application of those views would require it to pay, the defendant company, finding itself yet injured by taxation, levied on the value of a franchise which it has acquired by purchase from the United States, and is not taxable; and further, by a differential tax, based on the mere fact that its lines cross the State boundary, brings those considerations into Court, asking that measure of relief which strictly pertains to them.

This Court has also, in the case upon which the Circuit Court rested its action, expressed itself to the effect that the collection of the tax imposed by the statute, if considered a property tax, is not rendered unlawful by the fact of the company having entered into the relation contemplated and invited by the Act of July 24, 1866 (125 U. S., p. 552):

"The tax in the present case, though nominally upon

the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts, and the proportion of the length of its lines in that State to their entire length throughout the whole country, is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by Sec. 5263 of the Revised Statutes, or by the commerce clause of the Constitution."

Against this two considerations are urged:

FIRST. This was before the opinion in California vs. the Pacific R. R. Cos. (*supra*) was announced, and is believed to be inconsistent with the result there given, of discussion and consideration of important causes hinging exclusively upon that question.

SECOND. The tax imposed by the Massachusetts Statute is by express designation of the statute "a tax "upon its corporate franchise at a valuation thereof "equal to the aggregate value of its shares," &c.

This statutory definition has been repeatedly affirmed by the Supreme Court of that State:

"The excise tax, which the petitioner seeks by this petition to recover, was imposed by virtue of the Pub. Sts., C. 13, Sect. 38. Under the previous acts (Sts. 1864, C. 208; 1865, C. 283; and 1867, C. 52) upon which the section in question is founded, this exercise has repeatedly been held to be a tax upon the franchise of a corporation, and not upon its property, and thus is constitutional.

Boston Manufacturing Co. vs. Commonwealth, 144 Mass., 598.

Some of the cases in which that Court has repeatedly held to the same effect are:

Commonwealth vs Hamilton Manuf. Co., 12 Allen, 298.

Commonwealth vs. Cary Improvement Co., 98 Mass., 19, 22.
Commonwealth vs. Berkshire Ins. Co., 98 Mass., 25.
Manufacturers' Ins. Co. vs. Loud, 99 Mass., 146.

Upon this precise point, in the construction of this statute, the Supreme Court of Massachusetts was followed by this Court in *Hamilton vs. Massachusetts, 6 Wall., 632.*

"Property taxation and excise taxation, as authorized in the Constitution of the State, are perfectly distinct, and the two systems are easily distinguished from each other, if we adopt the definition of the term 'commodities,' as uniformly given by the Courts of the State, and as universally understood by the taxpayers and assessors. If regarded as meaning goods and wares only, there would be much difficulty in the case; but if it signifies 'convenience, privilege, profit and gains,' as uniformly held by the State Court, then all difficulty vanishes, and the case is clear. Such was the construction given to the term by the Supreme Court of the State more than fifty years before the present controversy arose, and the rule is well settled in this Court that the construction of a statute of a State by the highest judicial tribunal of such State, in a case not involving any question under the twenty-fifth section of the Judiciary Act, is to be regarded as a part of the provision, and that it is as binding upon the Courts of the United States as the text."

VI.

The Court below erred in first applying the amount paid into Court by defendant in each case, to extinguish entirely the interest due at the date of such payment upon the full amount claimed by the Commonwealth.

In each of these cases the defendant, upon leave of the Court, made a tender and actually paid into Court a certain sum of money made up (exclusive of costs also paid) of several amounts as follows: (1) The principal amount admitted in its answer to be due as a property tax. (2) Interest on this amount at the penal rate up to the date of tender.

Record, pp. 11, 22, 34.

The respective decrees show that, the franchise tax claimed by the Commonwealth having been sustained, the Court applied this total payment, first, to the extinction of the penal interest accruing up to the date of tender upon the entire amount claimed by the Commonwealth, and as to the remainder, in diminution of the principal amount so claimed.

Upon the residue left after this deduction as an entirely new principal, interest at the penal rate was allowed to the date of entry of decree.

Rec., pp. 12, 24, 35.

It was insisted upon the settlement of the decrees that the amount paid into court in each case should be applied, first, to wipe out only so much of the interest claimed by the Commonwealth to be due at the date of tender, as was equivalent to the interest upon the amount admitted in the answer. This, of course, would leave remaining an amount exactly equal to the principal sum admitted by the defendant in its answer, and it was contended that this residue should be applied to extinguish that principal sum.

There would then remain due at the date of tender, if the tax as assessed should be sustained, a gross amount consisting of (1) the difference between the

amount of the tax as assessed and the amount admitted due in the answer, and (2) the interest upon this difference up to the date of the tender. The first component would continue to draw interest to the date of decree, while the second, being itself interest, could not do so.

In short, the defendant claimed that the payments into Court should be applied consistently with the position taken in the several answers and the appropriation desired by the debtor and evidenced by the motions themselves as well as the several answers, to the extinction of the principal amount admitted by the defendant, with interest to the date of tender; and that the amount for which a decree should be entered was the excess amount claimed by the Commonwealth and not admitted by the defendant, with interest thereon to the date of entry of decree.

The failure of the Court so to hold is now assigned as error.

It is elementary law that in case of two debts the right of appropriation of payments resides primarily in the debtor, and only in the absence of all evidence of its exercise by him will the Court permit an appropriation by the creditor, or itself exercise the right in his behalf if suit has been begun.

II. Parsons on Contracts, p. 630 and cases.
Addison on Contracts, p. 1211.
Mr. Justice STORY in Cremer vs. Higginson, 1 Mason, p. 338.
Taylor vs. Sandiford, 7 Wheaton, 13.
Reed vs. Boardman, 20 Pick., 441.

Here the amount paid into Court as the equivalent of a property tax is in the decree applied in reduction of

the franchise tax claimed by the Commonwealth, so that *the complainant having succeeded*, the application of the payment is made by the Circuit Court upon the debt claimed in the information and not upon a different debt.

There is, however, an intention clearly expressed to pay into Court such an amount as would extinguish only so much of the amount claimed, as was equal to a tax at the regular rate upon defendant's property in Massachusetts, with interest thereon to date of tender.

The answer of the company in each case states the amount admitted due. Take the case of 1886, for example (the phraseology of the answers being substantially uniform). After admitting the justice of a property tax if levied at the regular rate, the defendant (Rec., p. 8)—

"prays leave of this Court to bring and pay and by said leave doth bring and pay unto said Court for the use of the complainant, to be by it taken without condition or future objection, the sum of $7,574.47, being, as aforesaid, $14.48 per $1,000 of said $422,756.75 (as the full and true value of all said property) with interest at the rate of 12 per cent. per annum thereon, from the third day of November, A. D. 1886, to the time of said payment, together with $40.60 costs of this suit to said time, and the Clerk's fees for such payment."

Defendant's motion for leave, filed upon the same date as its answer, is in these words (Rec., p. 11):

"And now the defendant comes and moves the Court that it may have leave on such terms, if any, as this Court shall fix, to bring the sum of $7,574.47, being $14.48 per $1,000 of the sum of $422,756.75, mentioned in the answer in said case, with interest, at the rate of 12 per cent. per annum thereon, from the 3d day of November, 1886, to this day, October 25, 1888, inclusive," &c.

The motion in the 1887 case (Rec., p. 22) is in the same language, and that in the 1888 case (Rec., p. 34) is even more explicit, specifying the exact amount of interest tendered, as does also the answer in that case (Rec., p. 32).

There can, therefore, be no question of the defendant's intention as to the application of the amounts tendered in the several cases.

These cases should not be confounded with those where general payments are made on account, and the law appropriates each payment in the same manner as was done by the Circuit Court. Here the answers and motions show that the defendant desired the payments to be applied to liquidate a certain principal debt, admitted due the Commonwealth as a property tax, with interest on the same. This total amount was accepted by the Commonwealth in manner tendered as between principal and interest, and in like manner applied to the franchise tax not admitted. No objection whatever was made to the apportionment desired by the defendant, and we submit that even if the question could otherwise be raised under the general rules governing partial payments, the Commonwealth, by its acceptance of the payments as tendered, has acquiesced in the appropriation contended for by the defendant.

It is well settled that the creditor may be bound by acquiescence in an application of the payment to the principal debt instead of the interest.

Tillotson vs. Preston, 3 Johns., 229.

And it has been held generally in Massachusetts that where money is paid under conditions imposed by the debtor and the amount paid is received without objec-

tion the conditions are acquiesced in and are in all respects binding.

Hall vs. Holden, 116 Mass., 172.

Indeed, upon consent of parties, the ascription may be changed after having been once made.

2 Greenleaf on Evidence, § 532*a*, and cases cited.

If the tender of principal admitted due had been made the very day the tax became payable, it is clear that complainant's decree could only direct payment of the excess of the amount claimed by the State over the amount tendered, with interest upon that excess. The delay of the defendant in making payment is compensated for by the tender of penal interest upon the amount admitted due, so that such principal amount should in effect stand paid as of the day it became due with damages for detention.

UPON THESE GROUNDS it is submitted that the decree of the Circuit Court in each of these cases was erroneous, and should therefore be reversed.

WAGER SWAYNE,
For the Telegraph Company.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

ATTORNEY-GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, BY INFORMATION, APPELLEE,

v.

THE WESTERN UNION TELEGRAPH COMPANY,

APPELLANT.

(THREE CASES TO BE ARGUED AS ONE.)

MOTION FOR ADVANCEMENT.

Supreme Court of the United States.

OCTOBER TERM, 1889.

ATTORNEY-GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, BY INFORMATION, *Appellee*,

v.

THE WESTERN UNION TELEGRAPH COMPANY, *Appellant*.

MOTION FOR ADVANCEMENT.

The appellee above mentioned, representing the Commonwealth of Massachusetts (a party directly interested in the subject matter of said suit), now moves the Court to advance said cause upon its calendar, and to set down the same for argument upon some day to be fixed by the Court.

STATEMENT.

This is a suit, which is substantially three suits to be tried as one involving over $30,000, brought by the Attorney-General of Massachusetts under its Public Statutes, Chap. 13, Sect. 5, at the relation of its Treasurer, to recover a tax (assessed on the defendants under said chapter) the legality of which is denied. The question is whether the system of taxation under which this tax is assessed is constitutional and legal under the Constitution and laws of the United States and of the State.

The defendant is a corporation of the State of New York, and in 1867 accepted the provisions of the Act of Congress

of July 24, 1866 (Revised Statutes, Sect. 5263 *et seq.*), as follows: —

"AN ACT to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that *any telegraph* company now organized, or which may hereafter be organized, under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under or across the navigable streams or waters of the United States: *Provided*, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber and other materials for its posts, piers, stations and other needful use in the construction, maintenance and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption, through which its said lines of telegraph may be located, as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

"SECT. 2. And be it further enacted, that telegraphic communications between the several departments of the

government of the *United States* and their officers and agents shall, in their transmission over the lines of any of said companies, have *priority over* all other business, and shall be sent at rates to be annually *fixed by the Postmaster-General.*

"SECT. 3. And be it further enacted, that the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association or person. *Provided, however*, that the United States may, at any time after the expiration of five years from the date of the passage of this act, for postal, military or other purposes, *purchase all* the telegraph lines, property and effects of any or all of said companies at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

"Sect. 4. And be it further enacted, that before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster-General, of the restrictions and obligations required by this act." 14 Stat. 221; Rev. Stat., Sect. 5263 *et seq.*

The defendant claims that the tax in controversy is unconstitutional and void as in conflict with the act of Congress above stated, and with the Constitution of the United States and of Massachusetts, as claimed by the defendant in the court below.

The taxes directly involved are those for the years 1886, 1887 and 1888, and amount to over $30,000; but the defendant has declined to pay the tax for the year 1889, and it is said will refuse to pay its taxes hereafter accruing until the decision of this cause.

The case involves the validity of any tax assessed under the tax system of Massachusetts upon telegraph companies who have accepted the said act of Congress, and have constructed and operate lines on post roads in Massachusetts; and it is for the interest of the State that a speedy decision should be reached.

We are informed by counsel for the defendant that similar questions are involved in cases pending in other States, and that a decision in this case upon the merits of this question will probably be decisive of those cases and prevent their reaching the dockets of this court.

A similar cause was heard and determined by the Honorable Court in 1887 (125 U. S., 530) between the same parties. The appellant herein now seeks to raise new questions of law upon a new showing of facts. Should it be determined by this Honorable Court that under existing laws of the State of Massachusetts, this corporation may not be taxed, it is of importance to the State that the fact be seasonably known, in order that, by appropriate legislation, any defect in the statute may be remedied, to the end that the property of said corporation shall bear its appropriate burden of taxation; or, if it shall appear that, by reason of any unanticipated effect of the aforesaid arrangement between the United States and said corporation, in pursuance of said act of Congress, the several States are precluded from enforcing against said corporation a tax upon its property or franchise in pursuance with provisions heretofore operative, it is of importance that such construction be known at once, that a remedy, by way of possible Federal legislation, may be had, to the end that the vast property of said corporation may not for a number of years wholly escape taxation.

A. J. Waterman
Attorney General